Dec 21 1876
Submitted

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 661.

SOCRATES HUFF, PLAINTIFF IN ERROR,

vs.

C. W. DOYLE AND CHARLES BALES.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED JULY 14, 1876.

Dec 23 1876
Reversed
Jas Hunt

SUPREME COURT OF THE UNITED STATES.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court, before you, between Socrates Huff, plaintiff in error, and C. W. Doyle and Charles Bales, defendants in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf; you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at *at* the city of Washington, in the District of Columbia, on the second Monday of October next, in the said United States Supreme Court to be there and then held, that, the record and proceedings aforesaid be' inspected, the said United States Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 8th day of April, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the 100th.

[SEAL.]

Attest, &c.:

L. S. B. SAWYER,
Clerk of U. S. Circuit Court Cal.,
By J. F. O'BEIRNE,
Dep. Clk.

The above writ of error is hereby allowed.

WM. T. WALLACE,
Chief-Justice Supreme Court California.

(Indorsed:) 4332. United States Supreme Court. Socrates Huff, plaintiff in error, vs. C. W. Doyle and Charles Bales, defendants in error. Writ of error. Filed June 9th, 1876. D. B. Woolf, clerk.

2 UNITED STATES OF AMERICA, *ss:*

To C. W. Doyle and Charles Bales, defendants in error, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1876, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of California, wherein Socrates Huff is plaintiff in error, and you, the said C. W. Doyle and Charles Bales, are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 8th day of April, A. D. 1876, and of the independence of the United States the 100th.

[SEAL.]

WM. T. WALLACE,
Chief-Justice of the Supreme Court of the State of California.

We, the undersigned, hereby admit due and legal service of the above and within citation on behalf of C. W. Doyle and Charles Bales, the defendants in error herein, on this the 10th day of April, 1876, at the city and county of San Francisco, State of California.

FORTE & CARTER,
Attys. for Respondents in Er.

(Indorsed:) 4332. United States Supreme Court. Socrates Huff, plaintiff in error, vs. C. W. Doyle and Charles Bales, defendants in error. Citation. Filed June 9th, 1876. D. B. Woolf, clerk.

3 In the Supreme Court of the United States.

SOCRATES HUFF, PLAINTIFF IN ERROR,
vs.
C. W. DOYLE & CHARLES BALES, DEFENDANTS in error.
} In error to the supreme court of the State of California.

Record.

In the supreme court of the State of California.

SOCRATES HUFF, PLAINTIFF & APPELLEE,
vs.
C. W. DOYLE & CHARLES BALES, DEFTS. & appellants.

4 In the district court of the third judicial district, county of Alameda, State of California.

SOCRATES HUFF, PLAINTIFF,
vs.
C. W. DOYLE AND CHARLES BALES, DEFENDANTS.

Complaint.

Socrates Huff, the plaintiff in this action, complains of the defendants, C. W. Doyle and Charles Bales, and for cause of action avers as follows, to wit:

I.

That on the 15th day of October, 1871, the plaintiff was the owner, and seized in fee, and possessed, and entitled to the possession of that certain tract of land situate, lying and being in the county of Alameda, State of California, and described as follows, to wit:

The east half of section twenty-four, township three south, range two east, Mount Diablo base and meridian, containing three hundred and twenty acres of land, according to the United States surveys.

II.

That while the plaintiff was such owner, and so seized and possessed, and entitled to the possession of said land and premises, the said
5 defendants did on the day and year aforesaid, wrongfully and unlawfully, and without right or title, enter into and upon the

same, and oust and eject the plaintiff therefrom, and ever since said date unlawfully and wrongfully have withheld and still and now do wrongfully and unlawfully withhold the possession thereof from the plaintiff, to his great wrong, injury, and damage, to wit, in the sum of four thousand dollars.

III.

That the value of the rents and profits of the said land and premises is two thousand dollars per annum or for each farming season; that by reason of the wrongful and unlawful withholding of said land by the defendants the plaintiff has been deprived, and by the continuance thereof will be deprived, of the use and occupation thereof, to his loss and damage in the sum of $2,000 for each and every farming season.

IV.

Wherefore the plaintiff demands judgment against the defendants for the restitution of said land and premises, and for the sum of four thousand dollars damages for the withholding thereof, and four thousand dollars damages caused by the loss of the value of the rents and profits thereof, together with the costs of suit.

CRANE & JOHNSTON,
Plff. Attys.

6 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Socrates Huff, being duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

SOCRATES HUFF.

Subscribed and sworn to before me on this 23d day of June, 1873.
[NOTARY SEAL.] ALFRED C. CRANE,
Notary Public.

(Endorsed:) Filed June 24th, 1873. J. V. B. Goodrich, clerk, by John Yule, deputy.

[Title of court and cause.]

Amended answer.

Now comes Charles Bales, one of the defendants in the above-entitled cause, and, for an amended answer to the complaint of the plaintiff therein, denies all and singular the facts and allegations in said complaint contained.

He denies that on the 15th day of October, 1871, or at any other
7 time, the plaintiff was the owner or was seized in fee or possessed or was entitled to the possession of the tract of land in said complaint described, or any part thereof.

He denies that on said day and year aforesaid, or at any other time, he, said defendant, wrongfully or unlawfully, or without right or title,

entered into or upon said premises or any part thereof, or ousted or ejected the plaintiff therefrom, or that he has since said or any date, or at all wrongfully or unlawfully, withheld, or still or now wrongfully or unlawfully withholds, possession of said land or any part thereof from the plaintiff, or that by reason of any act or acts of his the plaintiff hath suffered damage in the sum of four thousand dollars, or in any other sum whatsoever. He denies that the value of the rents and profits of said land and premises is the sum of two thousand dollars per annum, or for each farming season; and avers that the same are of no greater value than the sumof one thousand dollars per annum, or for each farming season, and denies that, by reason of any act or acts of his, plaintiff hath or will suffer damage or loss in the sum of two thousand dollars for each or any farming season, or in any other sum of money for any other time.

Further answering, the defendant alleges that he has not now nor ever did have any interest in or possession of any part of the land
8 and premises by plaintiff described other than the south half of the same, and as to such south half his possession of the same is valid.

For a further and separate answer and defence to this complaint of plaintiff herein, the defendant alleges:

That said land and premises described, and the whole thereof, is, and was at the time hereinbefore mentioned, public domain of the United States, subject to the operation of the general laws thereof touching the disposition and possession of her public lands, and is and was, at and long prior to the time of the alleged entry and ouster complained of, subject to pre-emption settlement under the pre-emption laws of the United States.

That heretofore, to wit, on or about the day of , 1870, he, the defendant, entered and settled upon the southeast quarter of section 24, in township 3 south, of range 2 east, Mount Diablo meridian, in Alameda County, State of California, the same being the south half of the tract of land in plaintiff's complaint described. He erected a dwelling-house and other improvements thereon, and has ever since resided upon and cultivated the same, claiming and holding it as a pre-emption claim under the laws of the United States, and he still and now so claims and holds the same.

That he is and was at the times hereinbefore mentioned a citi-
9 zen of the United States, over the age of twenty-one years, and the head of a family, and has never had the benefit of a pre-emption. That he did not leave land of his own to settle upon the land described, and was not then and is not now the owner of 320 acres of land in any State or Territory of the United States.

That he did not settle upon said land for the purpose of acquiring title thereto for any person other than himself, and he has not made any contract whereby the title which he may acquire from the United States would inure in whole or in part to the benefit of any person or persons other than himself, and his settlement was not made for purposes of speculation, but with a view to making said premises a home.

That said land is agricultural and not mineral land.

That, after his said settlement as aforesaid, the township in which said land is situate having been surveyed by the United States authorities, said survey was duly constructed into a plat, and said plat was filed in the United States district land-office in San Francisco, in which district said land is situate, on the 28th day of June, 1871, and thereafter, on the day following, the defendant filed in said district land-

office his declaratory statement, in due form, as prescribed by the United States pre-emption laws, and paid to the register and receiver of said office the fees required therefor, and thereafter he duly made
10 proof before said register and receiver of his settlement, residence upon, and improvement of said land and his qualification as a pre-emptor, and tendered to them the Government price for said land, and has in all respects complied with the requirements of said pre-emption laws, so far as he has been permitted to do by said officers.

And for a further answer and defence to the complaint of the plaintiff herein the defendant charges and alleges:

That the land, as premises of the plaintiff described, and the whole thereof, that is to say, the east half of section 24, in township 3 south, range 2 east, Mount Diablo meridian, in Alameda County, in this State, was at all times from the year 1839 until the 14th day of June, 1871, within the limits of a valid Mexican grant, viz, the rancho Los Pocitas, and was at all times, between the dates last aforesaid, claimed by the grantees of said rancho and their assigns, as a part of said grant.

That heretofore, to wit, in the year 1867, whilst the rancho Los Pocitas was still unsurveyed, and before the survey of said land by the United States authorities, the State of California, under the provisions of an act of her legislature in relation to the location and sale of lands donated to her by the United States, made a selection of said land in lieu of a portion of a 36th section of land covered by a private
11 grant, and issued a certificate of purchase therefor, which was duly assigned to plaintiff.

That on the 14th day of July, 1871, after the settlement of this defendant upon the land, as set forth in his answer in this cause, the plaintiff made application to the register and receiver of the United States district land-office in San Francisco to be allowed to present and prove up his purchase and have said land certified over to the State of California by the Land Department of the United States, under the provisions of the act of Congress of July 23d, 1866.

That thereafter, on the 18th day of April, 1873, whilst a contest was pending between the plaintiff and this defendant before the register and receiver of said land-office, the Commissioner of the General-Land Office of the United States erroneously, and, as defendant believes, by mistake, listed said land to the State of California, and the governor of said State has issued to plaintiff a patent of the State of California for the same, and the plaintiff now sues this defendant for possession of said land and claims a right to recover the same under and by virtue of said patent, and in no other manner.

That the location by the State of California of said land in 1864 was illegal and void, and the act of Congress of July 23d, 1866, gave no force or effect to said location.

12 That the act of the Commissioner of the United States General Land-Office in listing said land to the State of California was irregular, illegal, and in fraud of the rights of this defendant primarily attached to the land, and was ineffectual to vest in said State any title.

That the patent of the plaintiff is void because of the absence of any title in the State of California to said land pretended to be conveyed thereby, but gives to plaintiff such color of title as enables him to harass and annoy defendant with suits, and tends to cloud the title which he will obtain from the United States.

Wherefore, he prays that said patent be decreed to be void and of no

effect; that it be directed to be cancelled, and that plaintiff be forever enjoined from asserting any title to said land and premises described under and by virtue thereof; and for such other and further relief as may be just, together with his costs in this behalf expended.

FOOTE & CARTER,
Atty. for Deft.

LIVERMORE, *ss:*

Charles Bales, being first duly sworn, says he is the defendant named in the foregoing answer and cross-complaint, and has heard the same read, and knows the contents thereof, and the same are true of his
13 own knowledge, except as to the things therein stated on information and belief, and as to such things he believes them to be true.

CHARLES BALES.

Subscribed and sworn to before me this 28th day of October, 1873.

GEO. E. FREEMAN,
Justice of the Peace.

Service of the within answer admitted on this 29th day of Oct., 1873.

CRANE & JOHNSTON,
Pltff's. Attys.

(Endorsed:) Filed Oct. 30th, 1873.

J. V. B. GOODRICH, *Clerk.*

[Title of court and cause.]

Amended answer.

Now comes C. W. Doyle, one of the defendants in above-entitled cause, and, for an amended answer to the complaint of the plaintiff therein, denies all and singular the facts and allegations in said complaint contained.

He denies that on the 15th day of October, 1871, or at any other time, the plaintiff was the owner, or was seized in fee or possessed, or was entitled to the possession of, the tract of land in said complaint described, or any part thereof.

14 He denies that on said day and year aforesaid, or at any other time, he, said defendant, wrongfully or unlawfully, or without right or title, entered into or upon said premises or any part thereof, or ousted or ejected the plaintiff therefrom, or that he has since said or any date, or at all, wrongfully or unlawfully withheld, or still, or now, wrongfully withholds, possession of said land or any part thereof from the plaintiff, or that by reason of any act or acts of his the plaintiff hath suffered damage in the sum of four thousand dollars, or in any other sum whatsoever.

He denies that the value of the rents and profits of said land and premises is the sum of two thousand dollars per annum, or for each farming season, and avers that the same are of no greater value than the sum of one thousand dollars per annum, or for each farming season, and denies that, by reason of any act or acts of his, plaintiff hath or will suffer damage or loss in the sum of two thousand dollars for each or any farming season, or in any other sum of money for any other time.

Further answering, the defendant alleges that he has not now, nor ever did have, any interest in, or possession of, any portion of the land and premises by plaintiff described, other than the north half of

15 the same; and as to such north half, his possession of the same is valid.

For a further and separate answer and defence to the complaint of plaintiff herein, the defendant alleges—

That said land and premises described, and the whole thereof, is, and was at the time hereinbefore mentioned, public domain of the United States, subject to the operation of the general laws thereof touching the disposition and possession of her public lands, and is, and was, at and long prior to the time of the alleged entry and ouster complained of, subject to pre-emption settlement under the pre-emption laws of the United States.

That heretofore, to wit, on or about the 1st day of November, 1870, he, the defendant, entered and settled upon the northeast quarter of section 24, in township 3 south, of range 2 east, Mount Diablo meridian, in Alameda County, State of California, the same being the north half of the tract of land in plaintiff's complaint described, he erected a dwelling-house and other improvements thereon, and has ever since resided upon and cultivated the same, claiming and holding it as a pre-emption under the laws of the United States, and he still and now so claims and holds the same.

That he is and was at the times hereinbefore mentioned a citi-
16 zen of the United States, over the age of twenty-one years, and the head of a family, and has never had the benefit of a pre-emption.

That he did not leave land of his own to settle upon the land described, and was not then, and is not now, the owner of 320 acres of land in any State or Territory of the United States.

That he did not settle upon said land for the purpose of acquiring title thereto for any person other than himself, and he has not made any contract whereby the title which he may acquire from the United States would enure, in whole or in part, to the benefit of any person or persons other than himself, and his settlement was not made for purposes of speculation, but with a view to making said premises a home.

That said land is agricultural and not mineral land.

That, after his said settlement as aforesaid, the township in which said land is situate having been surveyed by the United States authorities, said survey was duly constructed into a plat, and said plat was filed in the United States district land-office in San Francisco, in which district said land is situate, on the 28th day of June, 1871, and thereafter, on the day following, the defendant filed in said office his declaratory statement, in due form, as prescribed by the United States pre-emption laws, and paid to the register and receiver of said office the fees re-
17 quired therefor, and thereafter he duly made proof before said register and receiver of his settlement, residence upon and improvement of said land, and his qualifications as a pre-emptor, and tendered to them the Government price for said land, and has in all respects complied with the requirements of said pre-emption laws, so far as he has been permitted to do by said land-officers.

And for a further answer and defence to the complaint of the plaintiff herein, the defendant charges and alleges:

That the land and premises by the plaintiff described, and the whole thereof, that is to say, the east half of section 24, in township 3 south, of range 2 east, Mount Diablo meridian, in Alameda County, in this State, was at all times, from the year 1839 until the 14th day of June, 1871, within the limits of a valid Mexican grant, viz, the rancho Los Pocitas, and was at all times between the dates last aforesaid claimed by the grantees of said rancho and their assigns as a part of said grant.

That heretofore, to wit, in the year 1864, whilst the rancho Los Pocitas was still unsurveyed, and before the survey of said land by the United States authorities, the State of California, under the provisions of an act of her legislature in relation to the location and sale of lands
18 donated to her by the United States, made a selection of said land in lieu of a part of a 36th section covered by a private grant, and issued a certificate of purchase therefor, which was duly assigned to the plaintiff.

That, on the 14th day of July, 1871, after the settlement of this defendant upon the land, as set forth in his answer in this cause, the plaintiff made application to the register and receiver of the United States district land-office in San Francisco, to be allowed to present and prove up his purchase, and have said land certified over to the State of California by the Land Department of the United States, under the provisions of the act of Congress of July 23d, 1866.

That thereafter, on the 15th day of November, 1871, whilst a contest was pending between the plaintiff and this defendant before the register and receiver of said land-office, the Commissioner of the General Land-Office of the United States erroneously and, as defendant believes, by by mistake listed said land to the State of California, and the governor of said State has issued to the plaintiff a patent of the State of California for the same, and the plaintiff now sues this defendant for possession of said land, and claims a right to recover the same under and by virtue of said patent, and in no other manner.

19 That the location by the State of California of said land in 1864 was illegal and void, and the act of Congress of July 23d, 1866 gave no force or effect to said location.

That the act of the Commissioner of the United States General Land-Office, in listing said land to the State of California, was irregular, illegal, and in fraud of the rights of this defendant primarily attached to the land, and was ineffectual to vest in said State any title thereto.

That the patent of the plaintiff is void because of the absence of any title in the State of California to said land pretended to be conveyed thereby, but gives to the plaintiff such color of title as enables him to harass and annoy defendant with suits, and tends to cloud the title which he will obtain from the United States.

Wherefore, he prays that said patent be decreed to be void and of no effect; that it be directed to be cancelled, and that plaintiff be forever enjoined from asserting any title to said land and premises described under and by virtue thereof; and for such other and further relief as may be just, together with his costs in this behalf expended.

FOOTE & CARTER,
Attys. for Deft.

LIVERMORE, *ss:*

20 C. W. Doyle, being first duly sworn, says he is the defendant named in the foregoing answer and cross-complaint, and has heard the same read, and knows the contents thereof, and the same are true of his own knowledge, except as to matters alleged therein upon information and belief, and as to such matters he believes them to be true.

C. W. DOYLE.

Subscribed and sworn to before me this 28th day of October, 1873.

GEO. E. FREEMAN,
Justice of the Peace.

(Endorsed:) Service of the within answer admitted on this 29th day of Oct., 1873. Crane & Johnston, pltffs. attys.
(Endorsed:) Filed Oct. 30, 1873. J. V. B. Goodrich, co. clerk.

21 [Title of court and cause.]

Findings of fact.

From the agreed statement of facts and the evidence in this case the court finds the following facts, viz:

That in the year 1863 the State of California, under and by virtue of the laws of said State and in part satisfaction of the grant by the United States to said State of the 16th and 36th sections of lands in said State, or other lands in lieu thereof, under an act of Congress entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," approved March 3rd, 1853, selected and located the lands mentioned and described in the complaint, to wit, the E. ½ of sec. 24, T. 3 S., R. 2 E, Mount Diablo meridian, in the county of Alameda, State of California, containing 320 acres of land.

That said land was so selected and located by said State in lieu of, and as indemnity for, certain 16th and 36th sections, or portions thereof, which had become lost to said State under the terms and conditions of said act of Congress.

II.

That thereafter, and in the same year, the State of California sold said tract of land so selected and located as aforesaid, and the plaintiff or his grantor became the purchaser thereof from the State, and paid
22 the purchase-price therefor, and the State issued and delivered to said plaintiff, or to his grantor, the usual certificate of purchase for said land.

III.

That thereafter, and in the year 1865, the plaintiff or his grantor went into possession of said tract of land under said purchase from the State, put a house thereon, and farmed & cultivated said land, and raised grain thereon from year to year continuously until the 1st of November, 1870, at which time the defendants went upon and took possession of said land and premises.

IV.

That on the 28th day of June, 1871, the United States official plat of the survey of the township embracing said land was filed in the proper United States land-office, and on the 10th day of July, 1871, the plaintiff, then being the owner and holder of said certificate of purchase of said land, made application in his own name, and in the name of the State of California, to the proper Land-Department of the United States to present & prove up this said purchase and claim to said land, and also the claim of the State, and to obtain the approval of said State selection and location, and the listing and certification of said tract of land by the United States to the State of California.

V.

That such proceedings were afterwards had and taken upon said application of plaintiff that, on the 15th day of November, 1871, the United States, by its proper officers, did approve said selection and location of said tract of land by the State, and did list and certify over to the State of California said tract of land.

VI.

That thereafter, and on the 29th day of November, 1871, the State of California did, by its proper officers, issue and deliver to the plaintiff the patent of said State for said land, which patent is in due form, and purports to grant to the plaintiff, and to his heirs and assigns, the tract of land described in the complaint.

VII.

That the defendants were in the possession of said tract of land, respectively, at the time of the commencement of this action, and at the time of the trial thereof, as follows: The said defendant C. W. Doyle of the N. E. ¼ of said section 24; and the defendant Charles Bales of the S. E. ¼ of said section.

VIII.

That the annual value of the rents and profits of the lands mentioned and described in the complaint in this action, since the month of November, 1871, is the sum of three dollars per acre.

IX.

That each of the defendants has all the necessary personal qualifications to entitle him to pre-empt public land of the United States under the pre-emption laws thereof.

That the defendant C. W. Doyle, with full knowledge of the plaintiff's claim, and interest of, in, and to said land, on or about the
24 13th day of October, 1870, went upon and took possession of the N. E. ¼ of said section 24, and built a house thereon, where he has since resided, and cultivated said ¼ section, and held the same adversely to the plaintiff, and he has done such other acts on said land as are required by the pre-emption laws of the United States to entitle a person to pre-empt public land.

That about the same date the defendant Bales, with full knowledge of the plaintiff's claim and interest of, in, and to said tract of land, went upon and took possession of the S. E. ¼ of said section 24, and built a house thereon, where he has since resided, and cultivated said ¼-section, and held the same, adversely to the plaintiff, and done such other acts on said land as are required by the pre-emption laws of the United States to entitle a person to pre-empt public lands.

X.

That on or about the 29th day of June, 1871, each of said defendants filed his declaratory statement, in due form, in the proper United States land-office, thereby declaring his intention to pre-empt the ¼-section of

land on which he had settled, as above shown, and paid to the register & receiver of said office the fees required therefor.

That thereafter, and on or about the 4th day of December, 1871, the defendants each made and tendered certain proofs of their settle-
25 ments and improvements on said land to the register and receiver of said land-office, and requested said register and receiver to approve their pre-emption claims to said land, and to permit them to enter said land at said land-office under the pre-emption laws of the United States, and offered to pay the Government price therefor.

That said register and receiver refused to approve the said claims of the defendants, and refused to permit them to enter said land under said pre-emption laws, and refused to receive the purchase-price therefor, and still so refuses.

XI.

That some time prior to the year 1860 one Robert Livermore had obtained the final confirmation to himself of that certain Mexican grant called "Los Pocitas;" that the designation and description, as contained in the final decree of confirmation, and which is contained in the original grant as to the calls thereof, is as follows, to wit: "The land of which confirmation is hereby made is known as 'Los Pocitas,' and is bounded and described as follows, to wit: On the north by the Lomas de las Cuevas; on the east by the Sierra de Buenos Ayers; on the south by the dividing line of the establishment of San José; and on the west by the rancho of Don José Dolores Pacheco, containing,
26 in all, two square leagues, a little more or less, provided that quantity be contained within the boundaries named; and if less than that quantity be contained therein, then that less quantity is hereby confirmed."

That the area of land embraced by said boundaries is from ten to twelve square leagues of land embracing the greater portion of the place known as the Livermore Valley, in Alameda County; that the land in controversy in this action is situated in the southern end of said valley, and is embraced by the said exterior boundaries of said Los Pocitas as above given; that said Livermore, in his life-time, used said land for grazing purposes, and claimed the same as a part of said rancho Los Pocitas until his death, which occurred in or about the year 1859, and that his heirs continued to use said land in the same manner after his death.

That in the year 1865 the heirs and assigns of said Livermore, for the purpose of obtaining a United States patent under said decree of confirmation, procured a survey to be made by the surveyor-general of the United States for the State of California, which survey contained some nine leagues of land, and included the land in contest; that said survey was duly approved by said surveyor-general, but was afterwards,
27 in the year 1868, rejected and set aside by the Commissioner of the General Land-Office and Secretary of the Interior of the United States, and a new survey directed to be made which should contain but two square leagues of land.

That in the month of March, 1869, in pursuance of said direction, the said surveyor-general made an official survey of said rancho, constructed the same into a plat, and on the 11th day of May, 1870, approved said plat and survey, which contained about two square leagues of land and did not embrace the land in contest; that the heirs and assigns of said Livermore appealed from the action of the surveyor-general, in making said

two-league survey, and on such appeal said survey was confirmed by the Commissioner of the General Land-Office and Secretary of the Interior of the United States, and on the 6th day of June, 1871, said survey became final, and a patent was issued thereon to said claimants of the Los Pocitas for said two leagues, under which they have since held, and said patent does not embrace any portion of the land in contest in this action.

XII.

That in the year 1869 the township embracing the lands in contest in this action was surveyed in the field, and sectionized and subdivided and constructed into a plat by the surveyor-general of the United States for the State of California, but said plat was not finally filed in the
28 United States land-office until the 28th day of June, 1871, as aforesaid.

From the foregoing facts, I am of the opinion:

1st. That when the lands in controversy were excluded from the Los Pocitas rancho, by the finally approved survey of the rancho on the 6th day of June, 1871, they became part of the public domain of the United States, the title to which was in the United States, subject to be disposed of according to law.

2nd. That when the United States, by the Commissioner of the General Land Office, listed and certified over to the State of California these lands on the 15th November, 1871, this title passed from the United States to the State of California, under the grants made by Congress to the State, mentioned in the first finding; and by the patent which the State thereafter issued to the plaintiff on the 29th November, 1871, the title rested absolutely in the plaintiff.

3rd. That the entry of the defendants on said lands in November, 1870, did not vest them or either of them with the status of rights of a pre-emptor on public lands of the United States, because—

1st. At the time of the entry, the lands were within the exterior limits of a private grant, and were not the subject of pre-emption.

2nd. They had been reduced to possession in 1865 by the plaintiff, who had purchased them in good faith from the State of California,
29 under the laws of said State, and from 1865 until the entry of defendants the plaintiff had been, by himself and his tenants, in the actual occupation and use of the same.

3rd. The fact that defendants were qualified pre emptors, and had filed their declaratory statements to pre-empt these lands after they had become part of the public domain of the United States, did not change the status of the defendants, which resulted from their invasion of the plaintiff's possession, nor overcome the prior possession of the plaintiff.

Therefore, at the commencement of this action the defendants were unlawfully in possession of said lands, and the plaintiff having a right of entry to said lands arising from his prior actual possession, and the patent subsequently issued to him by the State of California, is entitled to judgment against each of them.

Let judgment be entered accordingly against the defendant C. W. Doyle for recovery of possession of the N. E. ¼ of section 24, township 3 south, range 2 east, Mount Diablo meridian, and the sum of $960 rents and profits of the same for the years 1872 and 1873, and costs. And against the defendant Charles Bales, for recovery of possession of the southeast quarter of section 24, township 3 south, range 2 east,
30 Mount Diablo meridian, and the sum of $960 rents and profits of the

same for the years 1872 and 1873, and costs. And let execution of each judgment be stayed for 30 days, after service on defendant's attorney of notice of filing of this finding.

S. B. McKEE,
Dist. Judge.

(Endorsed:) Filed Jan. 21, 1874. J. V. B. Goodrich, clerk, by John Yuler, deputy.

[Title of court and cause.]

Judgment.

This cause coming on regularly for trial at the October term, A. D. 1873, of said court, to wit: November 3rd, A. D. 1873, and Messrs. Crane & Johnston appearing for the plaintiff, and J. W. Carter, esq., appearing for the defendants, the court proceeded to the hearing of said cause.

All and singular the proofs and allegations, and certain documentary evidence of the respective parties having been introduced, and by the court seen, heard, and understood, and the respective parties having argued the cause before the court upon briefs, and the court having taken the cause under advisement, and now, to wit, on this the 21st day of January, A. D. 1874, the court having fully considered the same, and being now sufficiently advised, renders and files its decision and findings
31 herein, awarding judgment in favor of plaintiff and against the defendant C. W. Doyle for the recovery of the possession of the northeast quarter (¼) of section (24) twenty-four, township (3) south, range (2) two east, Mount Diablo meridian; also, for the sum of ($960) nine hundred and sixty dollars for the rents and profits of the same for the years 1872 and 1873, and also his costs herein.

Also against the defendant Charles Bales for recovery of possession of the southeast quarter of section (24) twenty-four, township (3) three south, range (2) two east, Mount Diablo meridian, and also for the sum of ($960) nine hundred and sixty dollars for the rents and profits of the same for the years 1872 and 1873, and also his costs herein.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is by the court ordered, adjudged, and decreed that the plaintiff herein is entitled to, and do have and recover of and from the defendant C. W. Doyle, the recovery of the possession of the premises in complaint described as follows, to wit:

The northeast quarter (¼) of section (24) twenty-four, township (3) three south, range (2) two east, Mount Diablo meridian, in the county of Alameda, State of California, also the sum of nine hundred and sixty dollars, ($960,) the rents and profits of the said premises for the years 1872 & 1873, and also his costs, and herein taxed at $100.

32 Also, from the defendant Charles Bales, for the recovery of possession of the southeast quarter of section twenty-four, (24,) township (3) three south, range (2) two east, Mount Diablo meridian; and also the sum of nine hundred and sixty dollars ($960) for the rents and profits of said premises for the years 1872 and 1873, and also his costs, and herein taxed at ($100) one hundred dollars.

Judgment entered January 21st, A. D. 1874.

J. V. B. GOODRICH, *Clerk.*
By JOHN YULE, *Deputy.*

[Title of court and cause.]

I, the undersigned, county clerk of the county of Alameda, State of California, and ex-officio clerk of the district court of third judicial district of said State, in and for said county, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled action and recorded in judgment-book D, of said court, at page 462. And I further certify that the foregoing papers hereto annexed constitute the judgment-roll in said action.

Witness my hand and the seal of the district court this 21st day of January, A. D. 1874.

J. V. B. GOODRICH,
Clerk.

By JOHN YULE,
Deputy Clerk.

(Endorsed:) Filed January 21st, 1874.
J. V. B. GOODRICH, *Clerk.*
By JOHN YULE, *Deputy Clerk.*

[Title of court and cause.]

Notice of appeal.

You will please take notice that the defendants, and each of them, in the above-entitled action hereby appeal to the supreme court of this State from the judgments therein made and entered in the said district court on the 21st day of January, A. D. 1874, in favor of the plaintiffs in said action, and against said defendants, and from the whole thereof.

Dated this 21st day of March, A. D. 1874.

Yours, &c.,

FOOTE & CARTER,
Attorneys for Defts.

To the clerk of said district court, and Messrs. Crane & Johnston, attorneys for plff.

(Endorsed:) Filed March 21st, 1874. J. V. B. Goodrich, clerk, by John Yule, deputy.

33 (Endorsed:) Service and receipt of a copy hereof admitted, after filing, this 23rd day of March, 1874. Crane & Johnston, attorneys for plff.

Clerk's certificate.

STATE OF CALIFORNIA,
County of Alameda, ss:

J. V. B. Goodrich, county clerk of said county, and ex-officio clerk of the district, county, and probate courts in and for said county, hereby certify that I have compared the above and foregoing copy with the original complaint, amended answer of Charles Bales, amended answer of C. W. Doyle, findings of fact, and judgment and notice of appeal, and that an undertaking on appeal on behalf of the appellants, Doyle & Bales, in due form, has been properly filed on, to wit, the 21st day of March, A. D. 1874, simultaneously with the filing of said notice of appeal; and I fur-

ther certify that the same are full, true, and correct copies of such originals in the aforesaid-entitled cause, and of the whole thereof, as the same now remain of record and on file in the office of said district court.

Witness my hand, with the seal of said court affixed, at Oakland, this 11th day of April, A. D. 1874.

J. V. B. GOODRICH,
County Clerk, &c.,
By JOHN YULE,
Deputy Clerk.

34 In the supreme court of the State of California.

SOCRATES HUFF *vs.* C. W. DOYLE ET AL. } No. 4332. (Filed April 6th, 1875.)

Decision & judgment of court.

The selection and sale of the land by the State in 1863 was void for the reason, among others, that the lands were then unsurveyed. The plaintiff therefore relies for title mainly upon proceedings had under the act of Congress of July 23rd, 1866, to quiet land-titles in California. (14 U. S. Stats. at Large, 218.) He made application under the third section of the act on July 10th, 1871, and the application was approved and the land was certified over to the State November 15th, 1871. The lands were within the exterior limits of the rancho Los Pocitas, the claim to which had been confirmed and the rancho surveyed before the passage of the act of July 23rd, 1866, but by the survey of the rancho, which was finally confirmed June 6th, 1871, the lands in controversy were excluded.

The question arising upon these facts is whether the act of July 23rd, 1866, confirms selections made by the State of lands which at the passage of the act were claimed under a valid Mexican grant, but which were afterwards excluded from the rancho by the finally-confirmed survey.

35 A discussion of the question at this time is, for obvious reasons, unnecessary, and we shall only announce the conclusion to which we have arrived upon a construction of the provisions of the act of Congress, which is that the act does not confirm such State selections; that is to say, that the purchaser of such lands from the State is not authorized by the act to "present and prove up his purchase and claim" to the lands.

From this construction of the act of Congress it results that the certifying and listing of the lands to the State was unauthorized and void, and that therefore the patent issued by the State did not convey to the plaintiff the title to the lands. (See act of Congress of Aug. 3rd, 1854, 10 U. S. Stats. at Large.)

The plaintiff cannot maintain his action upon prior possession alone, for the lands were public lands of the United States, (if not properly listed over to the State,) and the defendants, as qualified pre-emptors, were authorized by law to enter and hold the possession of the lands as against the plaintiff.

Judgment reversed and cause remanded, with directions to enter judgment for the defendants for their costs.

RHODES, J.

We concur.

WALLACE, C. J.
NILES, J.
McKINSTRY, J.

36 In the supreme court of the State of California, January term, A. D. 1875.

SOCRATES HUFF, RESPONDENT, *vs.* C. W. DOYLE ET AL., APPELLANTS. } No. 4332. On appeal from the district court of the 3d judicial district in and for the county of Alameda.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by Rhodes, J., Wallace, C. J., Niles & McKinstry, J. J. Whereupon it is now considered, ordered, adjudged, and decreed by the court here that the judgment of the district court of the 3d judicial district, in and for the county of Alameda in the above-entitled cause, be and the same is hereby reversed, and cause remanded with directions to enter judgment for the defendants for their costs.

I, D. B. Woolf, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the sixth day of April, A. D. 1875, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office this tenth day of June, A. D. 1876.

[SEAL.]

D. B. WOOLF, *Clerk*,
By H. P. BUSH, *Deputy*.

37 In the supreme court of the State of California.

Copy of bond for costs.

Supreme Court of the United States.

SOCRATES HUFF, PLAINTIFF IN ERROR, *vs.* C. W. DOYLE & CHARLES BALES, DEFENDANTS in error.

Know all men by these presents that we, Socrates Huff, of Alameda County, as principal, and H. F. Crane and Wm. W. Johnston, of the city and county of San Francisco, as sureties, are held and firmly bound unto C. W. Doyle and Charles Bales in the sum of five hundred dollars, ($500,) to be paid to the said C. W. Doyle & Charles Bales, their or either of their executors or administrators, to which payments, well and truly to be made, we bind ourselves and each of us, jointly & severally, and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, on this the 5th day of October, A. D. 1875.

Whereas the above-named Socrates Huff has prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled action by the supreme court of the State of California: Now, therefore, the condition of this obligation is

38 such that if the above-named Socrates Huff shall prosecute his said writ of error to effect and shall answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

In witness whereof we have hereunto set our hands and seals the day and year first above mentioned.

SOCRATES HUFF. [SEAL.]
H. F. CRANE. [SEAL.]
WM. W. JOHNSTON. [SEAL.]

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Henry F. Crane and Wm. W. Johnston, being severally duly sworn, depose and say, and each for himself deposes and says, that he is one of the sureties named in and who subscribed the foregoing obligation; that he is worth double the amount named in said obligation as the penalty thereof over and above all his just debts and liabilities and exclusive of property exempt from execution, and that he is a resident and freeholder within the State of California.

HENRY F. CRANE.
WM. W. JOHNSTON.

Subscribed and sworn to before me on this 5th day of October, A. D. 1875.

[SEAL.] J. H. BLOOD,
Notary Public.

39 (Endorsed:) No. 4332. Supreme Court of the United States. Socrates Huff vs. C. W. Doyle et al. Bond for costs on writ of error.

The within bond is hereby approved on this 8th day of April, 1876.

WM. T. WALLACE,
Chief-Justice of the Supreme Court of California.

Filed June 9th, 1876.

D. B. WOOLF, *Clerk.*

I, D. B. Woolf, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of a bond filed in my office on the 9th day of June, A. D. 1876, in the above-entitled cause, as shown by the records in my office.

Witness my hand and the seal of the court this 21st day of June, A. D. 1876.

[SEAL.] D. B. WOOLF, *Clerk,*
By H. P. BUSH, *Deputy.*

40 In the supreme court of the State of California.

Certificate of clerk.

SOCRATES HUFF, PLAINTIFF IN ERROR,
vs.
C. W. DOYLE AND CHARLES BALES, DEFENDANTS IN ERROR.

I, D. B. Woolf, clerk of the supreme court of the State of California, do hereby certify that the annexed and foregoing documents and papers are and constitute a true copy and transcript of the record and of all the proceedings in the above-entitled cause, as the same appear upon the records and files of said court in my office. And I do further certify that on the 29th day of April, 1875, a petition for rehearing was

filed in this court, and on the 28th day of July, 1875, the same was by this court denied, and on the 29th day of July, 1875, the remittitur of this court was issued and transmitted to the court below in said cause; that on the 9th day of June, 1876, the said plaintiff in error filed in this court a writ of error, (herewith transmitted,) duly allowed by the honorable W. T. Wallace, chief-justice of this court, removing said cause to the Supreme Court of the United States, and lodged in my office a copy of such writ of error for the defendants in error, and also filed a citation (herewith transmitted) purporting to have been
41 served upon the attorneys for the defendants in error; also a bond in the sum of $500, with sureties, approved by said chief-justice, conditioned that said plaintiff in error shall prosecute his said writ to effect, and in case he fail to make his plea good, to answer all costs, (a copy of which is hereto annexed.)

Witness my hand and the seal of said court on this the 21st day of June, A. D. 1876.

[SEAL.] D. B. WOOLF,
Clerk of the Supreme Court of California.

42 In the Supreme Court of the United States.

Assignments of error.

SOCRATES HUFF, PLAINTIFF IN ERROR,
vs.
C. W. DOYLE AND CHARLES BALES, DEFTS. IN error.
} In error to the supreme court of the State of California.

And now here, before the Supreme Court of the United States, comes the plaintiff in error, and says that in the record, holdings, decision, and judgement of the supreme court of the State of California in the cause aforesaid, there is manifest error, in this, to wit:

First. Said court erred in holding and deciding that the plaintiff in error did not, in the month of July, 1871, have the right, and was not authorized, under the act of Congress entitled "An act to quiet land-titles in California," approved July 23rd, 1866, and in pursuance of the 3rd section thereof, to present and prove up before the proper officers of the Land Department of the United States his purchase
43 of and claim to the land in question, under the State of California, with a view of having said claim allowed and approved, and said land certified over to the State.

Second. Said court erred in holding and deciding that the proceedings and acts of the proper officers of the Land Departments of the United States, in entertaining said application and investigating said purchase and claim, and thereupon certifying over said land to the State of California, under and in pursuance of said act of Congress, was unauthorized and void, and that the patent issued by the State to the plaintiff in error did not convey to him the title to said land.

Third. Said court erred in holding and deciding that the defendants in error were authorized by law to enter upon, and take possession of, said land and the improvements of plaintiff in error thereon, and oust him therefrom, and keep and hold possession thereof as against him, and that they thereby acquired a status which enabled them to intervene between him and the United States.

Fourth. Said court erred in assuming and holding that the defendants in error were in such privity with the United States as to enable

them in this action, and on the trial thereof, to attack and dis-
44 pute the validity of the acts and proceedings of the officers of the Land Department of the United States in the examination and adjudication of said claim, and the certification by them of said land over to the State of California, or the validity of the patent issued by the State in pursuance of such certification.

Fifth. Said court erred in sustaining the right of the defendants in error in raising and litigating the question of the exterior boundaries of the Mexican grant, Los Pocitas, on the trial of this action, or any claims formerly made under this grant by the grantees thereof or their assigns.

Sixth. Said court erred in sustaining the right of the defendants in error to attack and dispute the validity of said certification and patent under their pleadings in this action.

Seventh. Said court erred in assuming and holding that the validity and effect of the certification of said land over to the State by the proper officers of the United States could be questioned, litigated, or determined in an action of ejectment based upon a patent of the State issued in pursuance of said listing and certification of said land.

Eighth. Said court erred in reversing the judgement of the dis-
45 trict court of the third judicial district of the State of California, and ordering a judgement to be entered for the defendants in error for their costs.

Wherefore, and because of the errors aforesaid, the plaintiff in error prays that the said judgement and order of the said supreme court of the State of California may be reversed, and the said judgement of the district court of the 3rd judicial district aforesaid may be in all things affirmed, and that the plaintiff in error may have execution and a writ of restitution for the possession of said land, and such further or other relief as may be agreeable with right and justice and the practice of this court.

JOHN B. HARMON,
Atty. for Pltff. in Error.

(Indorsement on cover:) No. 661. Socrates Huff, plaintiff in error, vs. C. W. Doyle & Charles Bales. California supreme court. Filed 14th July, 1876.

No. _____

In the Supreme Court

OF THE

UNITED STATES.

SOCRATES HUFF,
Plaintiff in Error,

vs.

C. W. DOYLE and
CHARLES BAYLES,
Defendants in Error.

Argument of Plaintiff in Error.

JOHN B. HARMON,
Attorney for Plaintiff in Error.

S. F. LEIB, Esq.,
Attorney for Defendants in Error.

Filed _____

_____ *Clerk.*

SAN FRANCISCO:
BONNARD & DALY, BRIEF AND TRANSCRIPT PRINTERS, 609 Merchant Street.
1876.

IN THE SUPREME COURT

OF THE

UNITED STATES.

SOCRATES HUFF,
Plaintiff in Error,

vs.

C. W. DOYLE and
CHAS. BAYLES,
Defendants in Error.

BRIEF and ARGUMENT of PLAINTIFF in ERROR.

Statement of the Case.

By the decision and judgment of the State Supreme Court, the validity of the title claimed by the plaintiff in error to the land described in the complaint, is denied.

The immediate claim of title in the plaintiff is based on a patent of the State of California, in due form, purporting to grant to him, his heirs and assigns, said land.

This patent was issued to the plaintiff by the State in pursuance of certain proceedings had and taken before the land departments and the proper officers thereof, of the United States, under the

3d Section of the Act of Congress, entitled "An Act to quiet land titles in California," approved July 23d, 1866, 14 Stat. at Large, 218.

The claim of the plaintiff to the land was regularly presented to the proper officers of the United States Land Department under said Act, and by them investigated and approved, and the land certified over to the State.

By the decision of the State Supreme Court, the right of the plaintiff to present his claim under said Act of Congress is denied.

The authority of the proper officers of the United States Land Departments in entertaining, investigating and approving said claim, and certifying the land over to the State, is also denied.

The defendants in error have no title to the land, and are in no privity with the State, or the United States, or any source of title.

By the 6th Section of the Act of Congress, approved March 3d, 1853, 10 U. S. Stat. at Large, 246, the 16th and 36th Sections in every township in the State of California were granted to the State for the purposes of public schools.

By the 7th Section of the same Act it was provided, that where any such 16th or 36th Sections should be taken by settlers before survey, or where the same should be reserved for public uses, or taken by private claims, *other land* should be *selected by the proper authorities of the State* in lieu thereof, subject to approval by the Secretary of the Interior, etc.

Many of these 16th and 36th Sections having become lost to the State under the terms of this grant, the Legislature of the State having passed various Acts providing for the selection and sale of *other lands* in lieu of the Sections thus lost, and for the survey of townships under the authority of the State, where not already surveyed by the United States, preliminary to the selection and sale of such lands.

Under this State law the land in controversy was selected by the proper authorities of the State in 1863, as indemnity for certain 16th and 36th Sections lost to the State, and by the State sold to the plaintiff's grantor, who paid the full purchase price therefor and received a certificate of purchase of the same from the State.

In the year 1865, the plaintiff having become the owner of the State claim by purchase, went into possession of the land, and thereafter remained in occupation thereof, erected a house thereon and cultivated and farmed the land continuously from year to year until in or about the month of November, 1870, when the defendants came upon the land and ousted the plaintiff therefrom, and took possession of the land and the plaintiff's improvements.

Some time prior to 1866 it was found that certain of these State selections had been made of lands which had been surveyed by authority of the United States, but that no notice had been given or communication had with the Land Departments

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Some time prior to 1866 it was found that certain of these State selections had been made of lands which had been surveyed by authority of the United States, but that no notice had been given or communication had with the Land Departments

of the United States, relative to such State selections, and such selections had not been approved by any officer of the United States Land Department.

That as to a large number of such selections and sales by the State, the land had not been surveyed by authority of the United States, at the date of selection, and only surveyed in pursuance of the law of the State, and it had been adjudged by the State Courts that this class of selections were for that reason invalid, and it was known, or supposed, that there were conflicting claims arising out of adverse pre-emption claims, reservations for public uses, Mexican grants, town sites, etc.

In view of these facts, and to remedy the evils which must necessarily befall these purchasers from the State, by the premature action of the State in the selection and sale of these lands, and to provide a means whereby the titles of these purchasers could be acquired, Congress, at the request of the State Legislature, passed the Act entitled "An Act to quiet land titles in California." Approved July 23d, 1866, 14 U. S. Stat. at Large, p. 218. For a full history of this matter see Toland *vs.* Mandell, 38 Cal., p. 34 to 41.

Some time prior to 1860, one Livermore had obtained the confirmation to himself, of a Mexican grant called "Los Pocitas," which called for two square leagues of land within certain exterior boundaries.

These exterior boundaries were indefinite, and

like many of the Mexican grants in California, were and are nearly impossible of ascertainment, even as to general outlines, but are supposed to contain ten or twelve square leagues of land, or more.

The land purchased by the plaintiff, and now in controversy, is situate at the extreme southern end of the place known as Livermore Valley. After the plaintiff had taken possession of this land, but during the same year one Dyer, a United States Deputy Surveyor, made a pretended survey of the Mexican grant, "Los Pocitas," and under color of this grant surveyed in about nine square leagues instead of two, as required by the grant and decree of confirmation, and embraced the land in controversy.

This survey was rejected and set aside by the Secretary of the Interior of the United States in 1868, for the reason that certain parties, under the color of this grant, were attempting to obtain about seven leagues of public land of the United States, in excess of the amount called for by the grant, and thereupon directed the Surveyor-General to make a new survey, which should contain two square leagues of land, as called for by the grant.

In March, 1869, this new survey was made, in pursuance of such direction, for two square leagues, and approved by the Surveyor-General, and excluded the land in controversy; and in the same year the Surveyor-General of the United States surveyed the township embracing the land of

plaintiff, in the field, and sectionized and subdivided the same as other public land.

On the 11th of May, 1870, the two league survey of the grant was approved by the Surveyor-General of the United States, and the same was afterwards approved by the Secretary of the Interior of the United States, and on the 6th day of June, 1871, became final by the issuance of a patent thereon to the grantees and assignees under the Los Pocitas, who have since held under such patent.

On the 28th day of June, 1871, the approved plat of the township, embracing the land in controversy, was filed in the United States Local Land Office, and twelve days thereafter, to wit.: on the 10th day of July, 1871, the plaintiff presented and proved up his claim in said office, in compliance with Section 3 of said Act of Congress of July 23, 1866.

On the 15th day of November, 1871, said application and proofs having been forwarded to the General Land Department of the United States at Washington for investigation by the Commissioner of the General Land Office and Secretary of the Interior, and after such investigation, and on said last named date, said application, selection and claim was approved by both of said officers, and the Commissioner of the General Land Office certified over and relinquished the title of the United States to said land to the State of California, and the State thereafter, and on the 29th

day of November, 1871, issued to the plaintiff its patent in due form, which purports to grant the land described in the complaint to the plaintiff, his heirs and assigns.

The defendants having entered upon and ousted the plaintiff from said land in November, 1870, as aforesaid, filed their declaratory statements in said Local Land Office of the United States on the 29th day of June, 1871 as pre-emptors, and afterwards, in December 1871, offered to prove their qualifications as pre-emptors, their settlements etc., and offered to pay the government price for the land, all of which was rejected and refused by the proper officers of the United States Land Office.

On the 24th of June, 1873, plaintiff brought suit in the Third District Court, Alameda County, California, against the defendants, to recover possession of this land, and damages for the witholding, alleging ownership, and siezin, etc.

The defendants denied generally and specifically the title of the plaintiff, and further set out specially the selection of the land by the State in 1863, the purchase of the same by the plaintiff, that he prosecuted and proved up his claim at the Land Office of the United States, that the Commissioner of the General Land Office certified the land over to the State, and that the State had issued its patent for said land to the plaintiff, but alleging that at the time of the selection by the State, and until the final survey of the Mexican grant, Los Pocitas, said land was within the exte-

rior boundaries of said grant, and that they were qualified pre-emptors, had settled upon, improved and occupied the land, had filed their declaratory statements, and had also offered to prove their settlements and pay the government price for the land.

The case was tried by the Court without a jury, and special findings by the Court of questions of fact, and its conclusions of law, were afterwards filed, and judgment thereupon was rendered for plaintiff. Record p. 9

From this judgment the defendants appealed to the Supreme Court of this State, and that Court reversed the judgment of the District Court, and ordered that judgment be entered for the defendants for their costs.

For the opinion of the Court see Record p. 15

To reverse this decision of the Supreme Court of California, plaintiff in error has brought the case to this Court.

This was an appeal from the judgment alone, and, by the practice in California, no assignments of error or bills of exception are required on such appeals: therefore every error which could be properly raised upon the record was before the State Supreme Court, and so far as they are affected by the decision and judgment of that Court may properly be assigned in this Court, whether mentioned in the opinion or not.

The plaintiff in error relies upon each of the errors assigned in this Court. For a full statement of which see Record p. 15

Briefly stated they are as follows:

That said Court erred in holding—

1st. That the plaintiff in error was not authorized under the Act of Congress, of July 23, 1866, to present and prove up his purchase and claim to the land before the proper officers of the United States.

2d. That the entertaining and investigation of said purchase and claim, and the findings thereon. the approval thereof, and the certification of the land over to the State by such officers was unauthorized and void, and that the patent issued by the State to the plaintiff, in pursuance of such certification, did not convey to him the title.

3d. That the defendants in error were authorized to enter upon and take possession of the lands and the improvements of the plaintiff thereon, and oust him therefrom, and keep and hold possession of the same as against the plaintiff.

4th. That the defendants are in such privity with the United States, under the pre-emption laws thereof, as to enable them in this action to attack and dispute the validity of the Acts of the Land Department of the United States, in the examination and adjudication of the purchase and claim of the plaintiff, and the certification of said land to the State.

5th. That the defendants had the right to raise and litigate the question of the exterior boundaries of the grant Los Pocitas, and any claims formerly made thereunder by the grantees thereof or their assigns.

6th. That the defendants had the right to dispute the validity of said certification and patent under their pleadings in this action.

7th. That the validity and effect of such certification could be questioned in an action of ejectment, based upon said patent.

8th. And in reversing the judgment of the District Court, and ordering a judgment for the defendants in error for their costs.

Argument.

All the errors assigned will be covered by the discussion of the following propositions, which we submit, are disclosed by the record:

1st. That the plaintiff in error is shown to have the legal title to said land, and that the same is valid.

2d. That if there be any defect or invalidity in said title, the defendants in error are not in a position to question or dispute it.

3d. That even if the defendants have such an interest in said lands, and are in such privity with the United States under the pre-emption laws as would enable them to question said title, their pleadings are insufficient for such purpose.

4th. If the Supreme Court of California were right in reversing the judgment of the District Court, a new trial should have been granted.

A.

The plaintiff is shown to have the legal title, and the same is valid.

He produces the patent of the State dated November 29th, 1871, which is in due form, and purports to grant to him and his heirs and assigns, this tract of land.

He shows that on the 15th day of November, 1871, the United States did, by its proper officers, certify over and relinquish the title of this tract of land to the State of California.

There is no question as to the regularity and sufficiency of these documents on their face.

In asserting the above proposition, we do not claim that the selection of this land by the State in 1863 was regular or valid; but on the contrary we concede, that because such selection was made of land that had not been surveyed by authority of the United States, such selection was irregular and invalid, because such land was not subject to selection by the State. At least such had become the settled doctrine of the Supreme Court of this State as early as the year 1865. (Grogan *vs.* Knight, 27 Cal., 515.)

Neither do we assert that the Act of Congress of July 23, 1866, by its own operation confirmed the selections made by the State upon unsurveyed lands, or vested the title to any such lands in the State purchaser or the State. But we do assert that this Act, as to *this class of selections*, provided a means whereby the purchasers of these selections, who prior to the passage of the Act, had in good faith bought the land from the State, were authorized to present their claims under such pur-

chase to the proper officers of the United States Land Department for investigation and approval, and that, upon their being found to be free from conflict with any claims mentioned therein, the Commissioner of the General Land Office was authorized and required to certify the land over to the State, and such has been heretofore the uniform construction given to this Act by the Supreme Court of this State.

The construction of this Act, as to this class of selections, was fully considered in the case of Toland *vs.* Mandell, 38 Cal., 30.

This was an action of ejectment based upon a certificate of purchase issued to the plaintiff, and proof of possession thereunder.

The Court held that since the Act of 1866 these claims were no longer within the rule announced in Grogan *vs.* Knight declaring them invalid, that although the 1st Section of the Act purports to confirm all selections with certain exceptions, yet, when the 2d and 3d Sections are considered, the Act does not operate of itself to confirm to or vest title in the State to any of these selections, and the Court says "*That cannot happen until after the selection has come before the proper officers of the General Government, and after examination has been declared by them of the character described in Section* 1 — *that is to say, not within any of the exceptions there stated.*" Again, at page 43 "*Selections made upon unsurveyed lands are not absolutely confirmed to the State; but if they have been surveyed*

by authority of the State and sold to purchasers in good faith under her laws, and are marked off and designated in the field, they are allowed the same force and effect as pre-emption rights upon unsurveyed land, provided always they do not upon investigation by the proper officers, fall within any of the exceptions stated in Sec. 1 of the Act."

"The Act nevertheless, had the effect to legalize the possession of locators upon unsurveyed land under the State, until they should have an opportunity to present their claims for determination by the officers of the United States as therein provided." See also:

Hodapp *vs.* Sharp, 40 Cal., 69.
Foscalina *vs.* Doyle, 47 Cal., 438.
Flint *vs.* Bell, Oct. Term, 1870,

The last case cited is not reported in the bound volumes of reports, but in that case it is decided that in case the State purchaser permits the three months to expire after the township plats of survey are filed in the U. S. Land Office without presenting his claim, he loses all claim under the Act as against one who in the meantime has made a pre-emption settlement thereon.

Two classes of selections, made by the State and sold to purchasers in good faith prior to the passage of the Act, are specifically provided for by Sections 2 and 3 of the Act. The first where the selections had been made upon land which had been surveyed by authority of the United States; and second where the selections had been made upon

lands which had not been surveyed by authority of the United States, but which selections had been surveyed by authority of, and under the laws of the State.

The lands in controversy had not been surveyed by authority of the United States, but had been surveyed by State authority, and therefore came within the class of selections specifically provided for by Section 3 of the Act.

As to this class, Section 3 provides that they shall from the date of the passage of the Act, when marked off and designated in the field, have the same force and effect as the pre-emption rights of a settler upon unsurveyed public land, and that the State claimant shall have the same time after the filing of the township plat of survey with the Register of the U. S. Land Office to present and prove up his purchase and claim under the Act as is allowed such pre-emptors under existing laws, and *if found* in accordance with Sec. 1 of the Act, the land embraced therein shall be certified over to the State by the Commissioner of the General Land Office.

The rights of pre-emptors upon unsurveyed land in California are defined by Section 7, Act of Congress, approved May 30, 1862, 12 U. S. Stat., 409, 410. See also Act of Congress approved August 4, 1854, entitled "An Act to extend the right of pre-emption over unsurveyed lands in Minnesota, and for other purposes.

The substance of these Acts is, that the right of

pre-emption settlement is granted upon unsurveyed lands, but the settler is required to file his declaratory statement within three months after the filing of the approved plat of survey of the township in the U. S. Land Office.

The plaintiff being in the exclusive and undisturbed possession of the land, under the State purchase, from 1865 to 1870, was invested with the rights of a pre-emptor upon unsurveyed land, and that right continued from the date of the Act until three months after the filing of the township plat — if he had failed to present his claim within said three months, his right was gone.

It is perfectly apparent then that title did not pass either by force of the selection, or by the inherent operation of the Act of Congress, nor by the two combined — such purchasers were merely protected in their possession and given the privilege or right of presenting their claims and proving them up when the event happened giving them the opportunity, to wit.: the filing of the township plat.

This construction of the Act, found in the Act itself, cannot be disregarded. It declares precisely the *force* and *effect* which shall be given to these selections and claims.

No one has ever claimed that the pre-emption laws of the United States operated as a grant in any sense, much less a grant *in presenti.*

A grant cannot be revoked, but lands subject to pre-emption may be withdrawn from the operation

of the Act, devoted to public uses, or otherwise disposed of, at any time prior to payment, and the Courts have held that until the pre-emptor has not only performed the conditions required by law, but has paid for the land and obtained his pre-emption certificate, he has no title, legal or equitable.

In the case of the pre-emptor, *ownership* passes to the claimant upon payment for the land, and the legal title remains in the United States as trustee until the patent issues to the pre-emption claimant, when he first becomes vested with the legal title.

So, in the case of the purchaser of one of these State selections coming under the 3d Section of the Act of 1866, he becomes the *owner* of the land, not by force of the selection, for that was invalid and void so far as vesting any right of ownership is concerned, nor by the inherent and self-executing power of the Act, for it declares what the purchaser must do in the future, and within what period of time, in order to obtain its benefits: but he becomes the owner by presenting his claim and making his proof and submitting the same to investigation and adjudication by the proper officers of the United States during a given period, and if then found by this special tribunal, to whom these matters are referred by the Act, to be in accordance with Section 1 of the Act, that is, free from any conflict as to the cases there mentioned, the payment so made by the purchaser to the State is

applied and the land is certified over to the State to enable the State to give title to her purchaser.

But as the State has received the purchase price, and the legal title remains in the United States, and because there is indemnity due the State on account of certain 16th or 36th Sections or portions thereof, equivalent in amount to such indemnity, lost to the State, the Government, instead of requiring the State to pay for the land which it had sold without authority, certifies the land over to the State, and applies it upon the indemnity provided for by the Act of March 3d, 1853, and by this application of the land, evidenced by the certificate of relinquishment of the Commissioner, the legal title passes to the State.

In further proof that the Act of July 23d, 1866, did not vest any right of property in the purchaser of the State selection, we call attention to the last proviso of the 1st Section, which would authorize the Commissioner to refuse to certify over the land to the State, notwithstanding the purchaser had proved his purchase and claim, if the State had already received all the land she was entitled to by law for school or improvement purposes.

We have thus far discussed the effect and operation of the Act of 1866 only as to *when* and *how ownership* and title could be acquired as to the class of selections mentioned in the 3d Section of the Act.

This discussion naturally and necessarily precedes the consideration of the scope and effect of

the proviso on which alone the assertion rests that plaintiff's title is invalid.

The defence rested wholly upon the allegation, that at the time of the State selection, and at and after the passage of the Act of 1866, the land in controversy was within the exterior boundaries of a valid Mexican grant, and because thereof, and solely for that reason, the title afterward acquired by plaintiff was invalid.

The Court found, upon this issue, that the land was situate in the southern end of Livermore Valley, that the exterior boundaries of the grant embraced the greater portion of the Valley, and an area of from ten to twelve square leagues, and that the land in controversy is embraced by such boundaries.

But we insist that this grant having been officially surveyed, and the land taken by virtue of the grant having been segregated and patented before the time arrived when the plaintiff had an opportunity of presenting and proving up his claim under the Act of 1866, and no impediment then existing by reason of any former claim under said grant to a transfer of the title by the United States to the State, the issue and facts found thereon become wholly immaterial.

There are five exceptions under the provisos of Section one, and specifically stated, are as follows:

That no selection made by said State, contrary to existing laws, shall be confirmed by *this Act* for lands, viz.:

1st. To which any adverse pre-emption homestead or other right has *at the date of the passage of this Act*, been acquired by any settler under the laws of the United States.

2d. Or to any lands which have been reserved for naval, military or Indian purposes by the United States.

3d. Or to any mineral land.

4th. Or to any land held or claimed under any valid Mexican or Spanish grant.

5th. Or to any land which *at the time of the passage of this Act* was included within the limits of any city, town or village, or within the County of San Francisco.

As to selections falling within these provisos the express language is that they are not *confirmed* by *this Act:* but it will be seen that the first clause of the Act is broad enough to comprehend all manner of selections, and such as do not necessarily fall within those defined in Sections 2 and 3, the only condition being that they have been made under some grant to the State and sold to purchasers in good faith.

There were many cases where selections had been made by the State upon surveyed land, and where such selections had been reported to the U. S. Land Offices, and such selections noted and approved by such officers.

In all such cases the selections were *confirmed* by the direct operation and effect of the Act, provided they did not fall within the exceptions

named, notwithstanding any irregularity or defect that might exist in or about such selection or approval of the same.

As to this class of selections the confirmatory provisions as well as the exceptions may be said to have immediate operation.

The second Section of the Act provided for a class of selections which had been made by the State upon surveyed land, but of which no notice had been given, or communication had with the U. S. Land Office; in this case the authorities of the State were required to give such notice and report such selections, and the date of notice was to be deemed the date of the selection, and the several officers were thereafter required to examine and investigate such selections, and in case no conflict was found with any of the exceptions mentioned in Sec. 1, the land was to be certified over to the State, in part satisfaction of the grant under which the selection was made.

The 3d Section provides for a 3d class of selections, viz.: Those made upon lands which had not been surveyed by authority of the United States. No approval in the nature of the case could have been had by the U. S. Land officers of these selections, as they have no power to deal with the public lands until after survey and plats filed—neither was it practicable to confirm such selections by any Act of Congress, and hence the Act provided for future action in regard to this class.

That from and after the passage of the Act

such purchasers in possession should have the same status as pre-emption settlers upon unsurveyed land—that as soon as the townships embracing the land should be surveyed and the plats filed in the U. S. Land Office they should, within three months, present and prove up their claims, and in case the same were found free from conflict as to any of the exceptions mentioned in Sec. 1 of the Act they were to be approved and the land certified over to the State.

Thus the 3d Section provided not only a tribunal to examine and determine the questions arising under these provisions, but fixed a time *in the future* for the presenting of the claim and proofs and examination thereof.

This could not be done before the filing of the township plat, and must be done within a limited time after such filing, or the right of the claimant was barred, at least as to rights attaching after the time limited.

Thus it will be seen that as to this 3d class of selections the Act is in the nature of a *remedial system* or means of enabling these purchasers to acquire title, and in its construction attention will be given to the entire character of the Act in connection with all the circumstances which led to its adoption; the condition of the State as to land claims and the general policy of the Government in reference to school grants and indemnity lands in lieu thereof.

This brings us to the proposition that the Act

of July 23, 1866 is a highly remedial Act and should be liberally construed in favor of the remedy intended.

The title of the Act "*to quiet land titles*" ought to be conclusive of that.

As to that class of selections falling under the expression, "made by said State contrary to existing laws," the Act was *ex gratia*.

It was in no sense through the fault, neglect, or mistake of the Government that these lands had been selected by the State and sold to her purchasers—these purchasers had bought them of the State under her laws and had expended labor and money in improving them, and without the relief intended by the Act, were liable to have the fruits of their labor and money taken from them by pre-emptors and other purchasers from the United States, and all State titles would have been precarious and unsettled, and endless and expensive litigation would have been the result, the improvement and development of the country retarded, and poverty and want entailed upon helpless families.

The Act is not a general system for the disposition of the public lands, but limited to such lands as we have named, and for the benefit of those who had in good faith purchased them *before* the passage of the Act. None who purchased State selections after the passage of the Act could stand upon its provisions. *They* must stand or fall upon the validity of the selection under pre-existing laws.

But while legislating for the sole benefit of these purchasers, so far as the *immediate* effects of the Act were concerned, Congress was careful to protect adverse rights and claims *then* existing to these lands. Hence the further proposition, viz.:

These exceptions contained in Section 1 were for the benefit only of the persons and corporations therein named, and not for the benefit of strangers or persons not *then* having an interest in the land either absolutely or by relation, and it should be so construed.

The United States are protected by the declaration that no selection shall be confirmed on lands which have been reserved for naval, military or Indian purposes, nor to mineral land, and as to all other land, so far as the United States is concerned, the sole qualification is that the State shall not receive a greater quantity of land for school and improvement purposes than she is entitled to by law.

The rights of homestead and pre-emption settlers are protected only in cases where such rights had been acquired at the date of the passage of the Act: *existing rights*, not those which might be asserted, based upon a settlement made after the passage of the Act.

The rights of Mexican or Spanish grantees were protected as to any land held or claimed by them under such grants.

Cities, towns, villages, &c., were protected as to any lands which *at the time of the passage of the Act* was within their limits.

From this review it is apparent that no pre-emption claimant could acquire a right to the purchase of such land based upon a settlement made after the passage of the Act. In other words, it was obviously the intent of Congress to provide a way and means whereby the State purchaser should have rights co-equal with a pre-emption settler, and whereby he might secure the benefit of his purchase, provided at the time of his application there were no conflicting rights as defined by Sec. 1, and that the State should not thereby get more than her quota of land.

As an illustration of the principle for which we are contending, suppose that before the passage of the Act a pre-emption settler had made a settlement upon one of these invalid State selections, his rights are protected by the Act, but after the passage of the Act he had voluntarily abandoned his claim and left the land, and the State claimant had then gone into possession and the land had afterwards been surveyed and plats filed, who in all the wide world could be heard to object to the claim of the State purchaser being allowed under the Act?

Not certainly one who had subsequently entered and ousted him. If the Act amounted to a grant *in presenti* there might be some technical reason that the purchaser had no claim, but who could be heard to raise even that objection? Obviously only the United States or its privies. But we have seen that it is not a grant *in presenti*.

Suppose again that the selection, at the date of the passage of the Act, was in a region of country which might be embraced by the indefinite exterior boundaries of a Mexican grant embracing six times the area of land called for by the grant.

The Mexican grantee had but an inchoate right, and was entitled to have his land segregated and set apart to him, and he had the right to abandon his claim altogether; and if he had done so there would then be no impediment in the way of the State purchaser when the land came to be surveyed as public land. Or if after the passage of the Act the land claimed and called for by the Mexican grant is segregated by official survey and patent, and the grant satisfied, and all question as to its proper boundaries becomes forever settled, and the State purchaser is left in quiet possession of the land embraced in the State selection five miles, it may be from the nearest point of such official grant line, and afterwards the township embracing his selection is surveyed and the plats returned to the land office, and he presents his claim and it is allowed and approved, the land certified over and patented to him, and he or his grantees remain in possession for twenty years, making valuable improvements to an unlimited extent, would a Court of justice be found to say that any person possessing the qualifications of a pre-emptor could invade his possessions and oust him and then set up the defence that twenty years before, or more, the land *was*, or had been, embraced by the

ancient exterior boundaries of a Mexican grant, and thus be permitted to hold the land and improvements?

The decision of the State Supreme Court in this case leads to exactly such a result. The invasion of the plaintiff's possession by the defendants in 1870 did not in any manner affect *his* rights or privileges under the Act of 1866.

But looking at this Act in the light of existing facts at the time of its passage and what do we see?

California was literally plastered over with claims under Mexican grants, some with and some without boundaries named, and nearly all indefinite and uncertain to a degree scarcely to be comprehended by one not familiar with the country. No such boundary as a river, stream of water, parallel of latitude or meridian line, or a fixed monument, with given courses and distances, were given as a guide, except in rare instances. Generally, and as in the case of the Los Pocitas these boundaries did embrace or were claimed to embrace from six to ten times the quantity of land actually granted: and the Court can see upon the face of this record under what a precarious tenure titles are held if these old exterior boundaries are forever to be made the means of defeating such titles as ours.

The boundary on the north is "The Lomas de las Cuevas" (Hills of the Caves), on the east by the "Sierra de Buenos Ayres" (Mountains of good Air), on the south by "*the dividing line of the estab-*

lishment of San Jose," on the west by the Rancho of Don Jose Dolores Pacheco.

The Court found in substance that these boundaries embraced the greater portion of the place known as Livermore Valley; and because our land was in the southern end of that valley, that they embraced our land.

The only boundary that became material to fix on the trial was the southern, and we can truthfully affirm that there was no evidence of what is meant by "*the dividing line of the establishnent of San Jose,*" much less where it is located on the ground. The only evidence in reality on this issue was the old fraudulent survey made by Dyer in 1865, in the interest of himself and other speculators, whereby they sought to get, under color of this grant, about nine or ten leagues of land, which survey had been rejected and set aside in 1868 on account of this attempted fraud. It was not competent evidence, and it did not tend to prove anything except an attempted fraud on the United States. And it is upon such an issue as this, and a finding based upon such evidence that the Acts of the Officers of the United States are set aside, and these defendants in error are permitted to take and and keep our land and improvements. Under this doctrine no title like ours has any certainty or security.

But more is apparent from this Act.

By the 6th Section Congress gave a construction to the Act of 1853, granting the 16th and 36th

Sections to the State for school purposes, by declaring that the State should have the right of selecting land in lieu of 16th and 36th Sections, which had been settled upon prior to survey, reserved for public uses, covered by grants made under Spanish or Mexican authority, or by other private claims, or where such 16th or 36th Sections would be so covered if the lines of the public snrveys were extended over such lands—*and in case of Mexican or Spanish grants when the final survey of such grants shall have been made.* Here is unmistakable evidence that Congress intended that all 16th and 36th Sections embraced by the exterior boundaries of Mexican grants would inure to the State immediately upon their being excluded by the final survey of the grant, and that the claim of the State thereto was simply held in abeyance until the final survey of the Mexican grant, and the Sections thereby excluded.

The right of the State was contingent, but there was no obstacle in the way of Congress confirming this contingent right. It could not affect the Mexican claimant, and no other right, save that of the granting power, the United States, could be affected.

If these 16th and 36th Sections in this condition pass to the State on being excluded from the Mexican grant, we submit that lands selected by the State in lieu of 16th and 36th Sections were equally entitled to be certified over to the State upon proper presentation by the *bona fide* purchaser,

as provided in the Act, where they have been forever excluded from any possible claim under the grant. In such case the State purchaser could not prove his claim or present it until the lands were surveyed and plats returned, and the plats would not be returned (or were not in this case) until the Mexican grant had been satisfied by final survey and patent, so that the officers of the United States may know what lands are, and are not, subject to the claim of the grant.

It is only by these surveys that the officers of the Land Departments can know what lands are held or claimed under Mexican grants, and here note the language of the last clause of Sec. 3 of the Act, "and if found in accordance with Section 1 of this Act, the land embraced therein shall be certified over to the State by the Commissioner of the General Land Office."

Here is an investigation which does not and cannot take place until after the Mexican grant has been finally surveyed and its boundaries officially determined.

The plaintiff could not and did not present his claim until after all that had been done, and the township survey embracing his claim had been returned to the Land Office; now upon such examination it could not have been found that any of this land in question was held or claimed under the grant, for the records, maps and files of the Office showed that it had been forever excluded from any such claim.

This examination must necessarily relate to the condition and situation of the land at the time of the presentation and examination of the claim, so far as Mexican grant claims are concerned.

It is the present fact, the present condition, which is to be determined, and not a past fact or condition which might have existed one, five, or twenty years before. "If *found* in accordance," not if found to have been in accordance with Section 1.

Besides, if it does not relate to a present fact or condition, to what period in the past does the examination relate?

It will be noticed that the exceptions in regard to all other rights mentioned refer to rights and facts existing at the date of the passage of the Act, but no such reference is made in regard to Mexican claims. The language of the Act is "or to any land *held* or *claimed* under any valid Mexican or Spanish grant."

True, these words, held or claimed, taken alone denote a past perfect case, but with the context denote a present ~~past~~ fact; but by the language of the 3d Section this fact relates to a present time which is not the date of the Act but the *time* of the *examination*. The Act of Congress *itself* does not determine the fact whether any of the lands selected and sold by the State are "held or claimed" under a valid Mexican grant, or under a then-existing homestead or pre-emption right, but provides a tribunal which is required to determine

that question. In regard to homestead or pre-emption rights, this tribunal is to determine whether such rights existed at the date of the Act, and whether they still exist; but in regard to Mexican claims, the claim to be examined is synchronous with the Act and duty of investigation.

If we supply the same qualification which is made by the proviso in regard to homestead and pre-emption rights, viz.: "Or to any lands held or claimed *at the date of the passage of this Act* under any valid Mexican or Spanish grant," it is then apparent that the Act would have confined the examining officers to that date, and if Congress meant so to confine them, if, in other words, it was intended that lands *then held* or *claimed* under such grants should not in any event be approved or certified to the State, we might well suppose the same or similar language which they so aptly used in the case of other exceptions would have been used in this. In regard to homestead or pre-emption rights held at that date, it was assumed that having acquired these rights the same would be presented and perfected at the proper time—but in regard to Mexican grants, though declared by the Courts to be valid for a certain *amount* of land, it was certain that all in excess of the quantity granted would be excluded from such claim, and become subject to the disposition of the United States the same as other public lands, and in the same Act, Section 8, Congress provided for

the early accomplishment of that most desirable end by the official survey and segregation of such land.

The force and correctness of this construction is manifest also from the tenor of the 7th Section, which gives to the purchaser, in good faith, from the Mexican grantee, prior to the Act, lands excluded by the final survey, *where no valid, adverse right or title,* (except of the United States,) existed, a preferred right of purchase. Certainly it was no greater hardship that these purchasers from Mexican claimants should lose the fruits of their purchase, than that the State purchaser of indemnity School land should lose his. More than this, Congress here recognizes the fact that valid, adverse rights or titles might exist to these lands, and saved such rights as against the purchaser from the Mexican grantee.

Whatever rights existed must have been acquired before the lands were surveyed by the United States and before the purchase by the Mexican grantee; they were not acquired from the Mexican grantee and must have been created by the Act of 1866, or existed prior to its passage and independently of it.

This is important as showing that Congress was fully informed of the extent and condition of these Mexican claims as to the quantity of lands embraced in their exterior boundaries being largely in excess of the quantity really granted, and as recognizing their own right and power to provide

for their disposition so far as the same could be done without injury to the Mexican grantee.

The construction of this Act contended for by the defendants, would require these examing officers to *perform impossibilities* without accomplishing any good.

They would be required in every case to wholly ignore the plats of surveys in their offices, upon which they have ever been accustomed to base their official action, and dig up the old ancient archives and papers concerning these grants, and examine witnesses as to the location of these exterior boundaries on the ground, all of which is impossible to do with any degree of accuracy, as the most of these boundaries are wholly unknown to the present generation of mankind in California, and cannot be located on the ground.

It cannot be that Congress intended to put these officers to this great inconvenience and continue the curse which the people of California have endured by reason of these floating grants, having at best but indefinite, uncertain and in many cases wholly unknown and unascertainable limits, and to continue this burden upon the officers of the Land Departments long after all these questions have been made certain by official survey and patents of the grants, and where no object is to be attained unless it be an act of injustice.

The construction which we put upon this Act does no injustice to the United States or to any person, and at the same time accomplishes a simple

act of justice toward the plaintiff in error, who is shown by the record to have been a purchaser in good faith from the State seven years, and in the peaceable and undisturbed possession five years, before the defendants entered upon the land at all; no one had the remotest idea that this land was within the boundaries of this grant in 1863, when the selection was made, or when the plaintiff went into possession in 1865, and none ever would have suspected such a thing had not the nine league survey been made in the latter part of 1865, which sought to gobble up nearly all the land of the valley under color of this two league grant.

B.

In our discussion thus far we have assumed, what it is true, is shown by the record in this case, viz: that the Court found that the land in question was until the final survey and patent of the grant embraced by its *exterior* boundaries.

But this we submit was an immaterial issue and finding in this case if we are correct in our construction of the Act of Congress of 1866.

But if wrong in that proposition, then we submit that it was a question of fact, which Congress had authorized and required the officers of the United States Land Departments to investigate and determine, and they being specially designated by law for that purpose, their finding and determination upon this question of fact is conclusive in all

collateral proceedings, unless fraud or imposition is shown to have been practiced.

Nothing of this kind is charged, proved or found. The defendants charge by their pleadings, that on the 14th day of July, 1871, the plaintiff made application to the Register and Receiver of the United States Land Office in San Francisco to present and prove up his claim, and that afterward and on the 15th of November, 1871, the Commissioner of the General Land Office erroneously, and as defendants believe, by mistake, certified over said land to the State.

So far as appears by the entire record the proceedings were all regular.

There is no suggestion of what the error or mistake consisted, if there was any; it is not shown whether it was an error of law or a mistake of fact.

The defendants do not attempt to show by pleading or otherwise, what proofs were made before these United States officers. If it ever was material whether the land was within the exterior boundaries of the grant; it was a question of fact which the law made it the duty of these officers to find before approving the claim or certifying the land over to the State, and inasmuch as they did act upon the claim when the same was presented and proved up, the presumption would be that they did their whole duty and found that it was not within the exterior boundaries of this grant, and did not fall within any of the Exceptions of

Section One of the Act, for the reason that they approved the claim and certified the land over to the State.

Their finding was general, as it necessarily is in all such cases, that plaintiff's claim was in accordance with Section One of the Act, and the presumption in the absence of all proofs to the contrary, is that they did find upon the proofs presented, that the land was not held or claimed under a valid Mexican or Spanish grant at the date of the passage of the Act.

Otherwise the finding and determination of a competent tribunal, having special jurisdiction of the subject matter, would be overthrown by a presumption.

It is not at all strange that different tribunals should find differently upon this subject, when we remember the vague and indefinite boundaries of this grant. If there was, in fact, a different finding by these two tribunals upon this question, that does not affect the validity or regularity of the finding and determination of the officers of the United States upon which our title rests.

Their decision was and is final and conclusive in all proceedings where the same is drawn in question collaterally.

The defendants are now seeking to try this question of fact in a second tribunal, without reference to the finding already made by the original tribunal having jurisdiction of the matter.

In the case of Hosmer *vs.* Wallace, 47 Cal.,

471, the Supreme Court of this State says: "*It is a rule resting on reason and authority as well, that in the absence of fraud or fraudulent imposition on the officers of the Land Department, their determination of matters of fact is not open to review in the Courts. Being a special tribunal, to which the law confides the duty of deciding upon facts which are brought in question before them, their decision, if free from fraud, and not the result of fraudulent imposition upon them, is final and conclusive.*"

We see no reason why the above rule should not apply to this case as here presented.

In the case of U. S. *vs.* Arredondo, 6 Peters, 729, this Court lays down substantially the same rule—the Court there says: "*It is a universal principle that where power or jurisdiction is delegated to any public officer or tribunal over a subject matter, and its exercise is confided to his or their discretion, the Acts so done are binding and valid as to the subject matter, and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under Acts done, and the public or any person denying its validity are power in the officer and fraud in the party.*"

To say that the plaintiff had no right to present his claim before the officers of the Land Department of the United States, is in effect begging the main question; it assumes that the plaintiff

presented his claim with a full knowledge that the land was in such a condition that it could not be the subject of an investigation by said officers, under the Act of Congress, and that they were not authorized to make the investigation, whereas, the Act specifically confers upon them the authority and duty of investigating this class of cases, and they are in effect invested with full power and jurisdiction to hear, try and determine the question.

The proposition here claimed is that after the special tribunal has investigated the question and determined it in a direct proceeding in favor of plaintiff and the State, the same question can at any time afterward be put in issue in an action of ejectment and tried over again as a collateral issue by a Court or jury, and if found differently from the United States tribunal, th[illegible] for this reason and no other it can be said that the plaintiff never had any right to present his claim, and the tribunal had no jurisdiction to hear, investigate and determine the case.

Such a proposition is in my opinion perposterous. It assumes that the investigation of these officers amounts to nothing at all. Such a doctrine would be subversive of all security in land titles, especially in the State of California. It is not, never has been, and never will be the law. There is nothing in the case tending to show that at the time of purchase in 1863, the plaintiff or his grantor had the remotest suspicion that the land was included within the exterior boundaries of the grant.

He was in the peaceable, actual and undisturbed possession from 1865 to 1870.

The grantees of Los Pocitas had no legal claim to more than two leagues of land, and that claim was settled by the two league survey, made by direction of the Secretary of the Interior in 1869.

II.

Our second proposition is that even if plaintiff's title be invalid, that it is not void, but simply voidable, and that the defendants have no status to question or dispute its sufficiency.

1st. Because of the character of the proceeding.

2d. For want of interest in the subject matter.

That the land in controversy had been certified over to the State by the proper officer of the United States Land Department; that the plaintiff had purchased the same from the State in good faith and in conformity to her laws; and that the State had executed and delivered to him a patent therefor in all respects regular on its face, is conceded.

Nor is it claimed that any defect or irregularity appears upon the face of any of these proceedings, nor that they do not, upon their face, show a perfect title in the plaintiff.

The defect, if it exists, is a latent one, and the defendants claim the right to show such defect by proof outside of the record of our title, and thus

defeat the plaintiff's action and retain possession of the land.

That our patent was not void, is fully sustained by

Jackson *vs.* Lawton, 10 Johns., 23.

Johnson *vs.* Towsley, 13 Wallace, 86 and 87.

In the case last cited this Court says in substance that it will not interfere with the Land Department so long as the title is in the United States, and the matter is rightfully before those officers for decision, but "on the other hand, it has constantly asserted the right of the proper Courts to inquire *after the title had passed from the government*, and the question had become one of private rights, whether according to the established rules of equity, and the Acts of Congress, concerning the public lands, the party holding *that title* should *hold absolutely as his own, or as trustee for another.* "See especially same case, pp. 83 and 84. See also, Patterson *vs.* Winn, 11 Wheat., 381, where Jackson *vs.* Lawton, *supra*, is cited and approved.

Doll *vs.* Meador, 16 Cal., pp. 326 and 327.

Patterson *vs.* Tatum, in U. S. Circuit Court, District of California, reported in 8, Pacific Law Reporter, p. 110, *et seq.*

The case of Patterson *vs.* Winn, *supra*, is sometimes cited as an authority in support of the position assumed by defendants in this case, viz.: that they may show the invalidity of our title by proof of matters *dehors* the record.

The Court, in that case, (p. 384) say: "We may therefore assume, as the settled law of this Court, that if a patent is absolutely void upon its face, or the issuing thereof was without authority, or was prohibited by Statute, or the State had no title, it may be impeached collaterally in a Court of law in an action of ejectment. But, in general, other objections and defects complained of must be put in issue, in a regular course of pleadings, on a direct proceeding to avoid the patent."

It is asserted, in the case at Bar, that the certification of the land in controversy to the State, was without authority of law, and therefore void. But they go further, and say that it was without authority of law because of a question of fact respecting the situation of the land, viz.: whether or not it was held or claimed under a valid Mexican grant—a question which could not be determined by an inspection of the certificate or patent, nor by an examination of the law, nor by all combined—but which was required to be, and was determined by the officers of the Land Department upon proofs submitted to them—and if the State, when she issued her patent, had no title, it must have been for the same reason. This Court, we think, did not mean by its language above quoted, that such a question as that could be examined collaterally in a Court of law in an action of ejectment.

The case of Patterson *vs.* Winn did not require such a construction. If the Statutes of Georgia

prohibited the granting of more than 1000 acres to one person, the grant itself showed *prima facie*, at least, that the law had been violated, and thus put the grantee to proof that the Statute had not been violated.

This view is clearly sustained in Jackson *vs.* Lawton, from which the foregoing rule was extracted.

In that case Chief Justice Kent says; "If the elder patent were issued by *mistake*, or upon *false suggestion*, it is *voidable* only." And following the language adopted by this Court, he says, "that when the fraud, or other defect, arises on circumstances *dehors* the grant, the grant is voidable only by suit. The regular tribunal for this purpose is *Chancery*, founded on a proceeding by *scire facias*, or by bill, or information. It would be against precedent, and of dangerous consesequences to titles to permit letters patent, (which are solemn grants of record,) to be impeached collaterally by parol proof in this action."

In Johnson *vs.* Towsley, 13 Wallace, at p. 83, the Court says: "That the action of the Land Office in issuing a patent for any of the public land, subject to sale by pre-emption or otherwise, is *conclusive of the legal title*, must be admitted under the principle above stated, and in all Courts, and in all forms of judicial proceedings, where this title must control, either by reason of the limited powers of the Court, or the essential character of the proceeding, *no inquiry can be permitted into the circumstances under which it was obtained.*"

We conclude therefore that neither the certification nor the patent were void, so far as anything appeared upon the face of them, or by reason of anything arising upon a construction of the Statute —and that they did operate to divest the title of the United States, and showed a *prima facie* title in the plaintiff.

And we further conclude that this title was sufficient to enable the plaintiff to recover in an action of ejectment, and that the objections raised by the defendant to our title, and through which they seek to avoid it, are such as cannot be inquired into collaterally.

The form of the action and the pleadings, we shall notice more particulary hereafter.

But the defendants have no status for want of any interest in the property, which is the subject of the litigation.

In November, 1870, seven years after the plaintiff, or his grantor, had purchased and paid for the land, and after he had been five years in the actual possession and occupancy of it, cultivating the same from year to year continuously, and had built a house and made other improvements thereon, the defendants intruded upon this possession, ousted the plaintiff therefrom and took possession of the land and the improvements of the plaintiff. On the 29th of June, 1871, they filed their declaratory statements as pre-emptors in the U. S. District Land Office, and in December, 1871, offered to prove their settlement, and tendered payment

for the land, all which was refused by said land office.

This is the precise status of defendants, and the only basis upon which they stand to contest the validity of our title.

Their possession was a wanton and willful trespass upon the possessory right given to the plaintiff by the Act of Congress of July 23d, 1866; and with full knowledge of the plaintiff's purchase and claim, they attempted to make that possession the foundation of a right of pre-emption—but this claim was repudiated and rejected by the Land Department. Their right as between them and the United States had been adjudicated and determined against them. The very source of title through which they claimed to have acquired some right as against us, had declared they had no right. They were no longer in possession under even an implied license from the United States. Their right to possession under the pre-emption laws of the United States could exist only when, and as long, as their right to purchase existed. When their right to purchase was denied by the Land Department, the legality of their possession, even conceding that it was legal before, was gone *eo instanti*, and they were thenceforth trespassers.

Here, then, we have a most anomalous case. The defendants, who have obtained possession of the lands in question by a trespass against the plaintiff, and adjudged by the proper tribunal not to have even the right to purchase these lands

from the United States, and the United States, by its proper officers at the same time disclaiming ownership of them, and recognizing them by the act of the Land Department in granting its certificate, as well as by the rejection of defendant's claim, to be the property of the State of California or its grantee, yet defending an action of ejectment brought by this same grantee on the ground that the listing of the lands to the State was a fraud upon them, and therefore void; that per consequence the title was still in the United States, and that they, having the *qualifications* of pre-emptors, *intended* to purchase what the United States had refused to sell to them, and declared it had already sold to another.

We have already seen that the Act of 1866 gave the plaintiff the status and rights of a pre-emptor upon unsurveyed lands, except as against persons named in the provisos of Section one, and secured the right to him to present and prove up his claim at any time within three months after the filing of the Township plat in the U. S. District Land Office. This Act made the plaintiff a preferred purchaser, and secured him against all pre-emptors who should attempt to settle upon and purchase the land after the date of the Act. There can be no question of the power of Congress to give him this preference. That is clearly decided in Frisbie *vs.* Whitney, 9 Wallace, 187. When the defendants filed their declaratory statements the time had not expired for the plaintiff

to present and prove up his claim and purchase. He was still within the protection of the Act, and the defendants could not, by their forcible intrusion and the filing of their declaratory statements, or any other act of their own, acquire any rights as against the plaintiff, or in any way affect his rights. That they were permitted by the local Land Office to file their declaratory statements is most natural, if we suppose that they concealed from the Register and Receiver, the fact of the prior occupation and claim of the plaintiff (of which defendants had full knowledge), for at that time those officers had no means of knowing of plaintiff's purchase, but before defendants offered their proofs of settlement, the plaintiff had made his proofs, and with this knowledge defendants proofs were rejected. And the filing of the declarations, thus secured by concealment, was the only voluntary step taken by any officer of the Government tending toward the recognition of any right or claim on the part of the defendants to this land.

That these facts should give them any legal or equitable claim against the plaintiff; any right or status to dispute the plaintiff's title, or to require that it enure to their benefit, is a proposition so startling, so utterly at variance with right and justice, so subversive of all safety and quiet of titles, that were it not for the decision of the Supreme Court of California in this case, we should not consume time to argue it.

It is perfectly clear that none of the matters upon which defendants rely can avail them at law, and we shall therefore assume, for the moment, that both the action and pleadings are such as to give them the most favorable opportunity of making their case, and we shall see that they have neither any vested interest in the land, nor any equity therein or thereto.

The Act of July 23d, 1866, in relation to these State selections, and the Act of March 3d, 1863, in relation to the Suscol Ranch, are identical in spirit and purpose, and the case at Bar, on the supposition that the action and pleadings are such as to permit the equitable view of the case to be discussed at all, cannot be distinguished from the case of Frisbie *vs.* Whitney, 9 Wallace, 187.

The Court in that case said of Whitney's claim: "He never paid any money to the Government, never received a certificate of entry or pre-emption, though he offered to prove up his settlement; and he claims that his intrusion on Frisbie's grounds by violence, and his offer to prove his intention to become a *bona fide* occupant of the land, create an equity superior to Frisbie's, which demands of a Court of Chancery to divest Frisbie of his legal title and vest it in him. If there be any principle of law which requires this, the Court must be governed by it, but it is idle to pretend that such a decree would be founded in natural justice."

This language is equally applicable to the case at Bar. And we might go even further and say,

that even if what defendants did in the premises had invested them with all the rights and equities of the United States, they would still have nothing upon which they could stand and ask the aid of a Court of Equity. These lands originally belonged to the United States. They were held for disposition, a grant of the 16th and 36th Sections had been made to the State, a portion of which was lost to the State, but against which loss the State was indemnified by other lands to be selected. When this land was certified over to the State, the United States received a credit therefor on this indemnity account. The United States was not injured. No person or class of persons whose rights were saved by the Act of 1866, were affected. The lands had gone into the possession of the plaintiff, by whom they were cultivated, and thus the policy of the State and the general Government to dispose of the public lands to actual settlers, who should occupy and improve them, was in no way violated. Nor was the general Government at the time the plaintiff's purchase and claim were proved, and the lands certified to the State, under any obligation, moral, equitable or legal, to dispose of them in any other manner, or to any other person. But we are not disposed to make any concessions to the defendants.

There is no charm about the name or person of a pre-emptor. They are no more the objects of Government favor than those who purchase lands in any other manner for actual settlement and

occupation. No reason or motive of policy, charity, right or legal obligation can be named which would either justify or require that five years of plaintiff's labor in subduing, improving and cultivating this land should be swept away from him, and appropriated to the benefit of the defendants. · The pre-emption laws were not intended as an aid to robbery, but on the contrary, and to prevent wrong and injustice, not only this Court, but the Supreme Court of California, has always held that the pre-emptor acquired no rights as against the Government until payment, leaving the Government free to do *justice* between conflicting claimants. Mere possession will not put the defendants in privity with the United States, much less will a *wrongful* possession place them in that relation to the paramount source of title. We apprehend that the cases are very numerous in which irregularities have occurred in securing title from the United States; and if it be true that one though not in privity with the United States, but who has by a trespass secured the possession, can raise questions affecting the regularity and validity of the proceedings anterior to the patent, and put the patentee to proof of them, "such patent," as the Court well said in Doll *vs.* Meador, "would be anything but an instrument of security and repose. Such is not the law, and in no case which we have been able to find in the wide range of American jurisprudence. has it ever been held to be the law."

We cannot forbear quoting also the concluding portion of the opinion in that case:

"The point here is, as to the *status* of the party who can raise any question as to the validity, when it is regular on its face. Nor do we question the further proposition that the defendant might have disproved the evidence of title furnished by the patent, by showing that the land in question was not included in the Act of Congress, or was within the exceptions contained in the Act of this State. We only annex to the proposition the qualification, that to do this, he must first have brought himself in some privity with the common source of title. If he were a mere intruder, not possessing any claim of title, either from the general or State Government, he would not be in a position to question the regularity and correctness of the action of the officers of the State in the selection of the lands or the issuance of the patent. Until some one appears prepared to trace title to himself from a common or paramount source, parties who are clothed with the solemn evidence of title furnished by the patent of the State may rest in security, without fear of any successful disturbance in the enjoyment of the property held by them, whether that property be a portion of the school lands or swamp lands granted to the State by the general Government."

This case, decided in 1860, has ever since been the settled law of this State. In many cases it has been cited and approved, and in none in that Court has it been doubted or denied. Though in the case at bar, while it was not named or referred to, it was wholly disregarded and ignored.

In the case of Foscalina *vs.* Doyle *et al.*, 47 Cal., 437, Foscalina was the tenant of the plaintiff in error in the case at bar. The defendants in that case are the defendants here, and the land in controversy was also the same.

In that case it was directly held that the land in controversy was not subject to pre-emption when the defendants entered, or at any time since; that the possession of the plaintiff was lawful and was protected by the Act of July 23d, 1866; and that the defendants were trespassers without title or color of right.

While we are not at liberty to claim under the record in this case that the judgment of the Supreme Court in Foscalina *vs.* Doyle & Bales, is conclusive as a bar, it has, nevertheless, full force as an authority upon the point we are discussing.

That the inception of defendants' claim, based upon their possession acquired in November, 1870, was not only tortious and illegal, so far as plaintiff's rights were concerned, but also as against the United States; we think there can be no question; and that they could not make such wrongful entry and possession the basis of any equitable right, we think equally clear. It did not concern them whether our right to the possession of these lands, in November, 1870, was valid or not. If it was invalid, it was not because any right of theirs had been violated. These lands were not then subject to pre-emption, and not only so, but were in our possession under a claim of right.

The inception of defendants' claim was clearly wrongful, and having been so, we insist that it never could become the basis of a right, even against the United States, except by some act of the Land Department, amounting to a waiver of the wrongful entry. Their own acts never could have such an effect. No act of the Government, nor of the plaintiff, which could be tortured into a waiver of their wrongful entry, is shown. But our claim and title, from the moment the land was certified to the State and conveyed to us, became *adverse* to the United States and to all the world, and no subsequent recognition of the defendants' entry, could affect us.

In Frisbie *vs.* Whitney, *supra*, at p. 193, this Court said: "In this concession we also propose to waive the discussion of another question which presents serious difficulties to our minds, in regard to complainant's right to make a valid pre-emption by a forcible intrusion upon lands cultivated, enclosed and peaceably occupied by another man."

We regret that the Court did not directly decide that to be the law which is so clearly intimated in the above extract. The Suscol Ranch controversy did not end that mode of entry in California, as the case at bar clearly shows.

No principle is better settled than this: "that a wrongful or fraudulent act shall not be allowed to conduce to the advantage of the party who committed it."

As before remarked, if no other rights inter-

vened, the Government could waive the illegal entry of defendants, and treat them as rightfully in possession, for the purposes of pre-emption, but it has not done so.

We can see no reason why the maxim "*ex dolo malo non oritur actio*," does not apply in this case as well as in the more common cases of fraudulent contracts.

The strict enforcement of the doctrine intimated by the Court in Frisbie *vs.* Whitney, would do much to quiet titles, and prevent contests and litigation.

Certainly, the proposition that no man shall be permitted to avail himself of the liberality of the Government in the disposition of its lands, who, for that purpose, intrudes upon the possession of a *bona fide* occupant, and appropriates to himself the fruits of the possessor's labor and money, is one that commends itself to the right judgment and conscience of every one. No such intruder can come into a Court of Equity with clean hands, nor be heard to say, that though the plaintiff is a purchaser, in good faith, of the lands in controversy, and has expended labor and money in improving them, this Court must, by a strained and illiberal construction of the Act of 1866, and a forced presumption against the correctness of the finding of fact by the Land Department, deprive him of the title secured to him by the solemn act of the two Governments, National and State, and, waiving the illegality of defendants' entry, and their wrongful

purpose to appropriate to themselves the benefit of plaintiff's labor and money, bestow that title upon them.

If this Court shall regard this as a case in Chancery, it will not lend itself to the consummation of such a purpose. If it shall be regarded as a case at law, the legal title of the plaintiff must prevail.

III.

Our third proposition is:

That even if defendants have such an interest in the land, and are in such privity with the United States under the pre-emption laws as would enable them to question said title, their pleadings are insufficient for that purpose.

The complaint is in the ordinary form in an action of ejectment.

The answer contains, first—a general denial; second, a specific denial of each allegation, and third, "For a further and separate *answer and defence* to the complaint of the plaintiff herein, the defendants allege, &c.," setting up the special matters relied upon to avoid plaintiff's title—and the prayer is "that said patent be decreed to be void and of no effect, that it be directed to be cancelled, and that plaintiff be forever enjoined from asserting any title to said land and premises described under and by virtue thereof, and for such other and further relief as may be just, together with his costs in this behalf expended."

The prayer is for affirmative relief, but this mat-

ter is interposed as a *defence*, and not by way of a *cross-complaint*. Even granting that the matters alleged would have been good as a cross-complaint, they constituted no defence nor could they be litigated in that way. Upon this ground the defence was clearly demurrable.

But waiving the form in which the matter is alleged, it does not state facts sufficient to constitute either a defence or cross-complaint.

1st. It does not disclose any right or interest in the defendants, in the subject matter of the action.

This point we have already discussed in regard to the findings. and will not repeat them.

2. This defence does not disclose any mistake of law, nor allege any fraud or false suggestion by or through which the Land Department certified these lands to the State.

The allegation is "that the Commissioners of the General Land Office, *erroneously*, and, as defendant believes, by mistake listed said land to the State of California"....."that the act of the Commissioner of the United States General Land Office, in listing said land to the State of California, was irregular, illegal, and in fraud of the rights of this defendant primarily attached to the land, and was ineffectual to vest in said State any title thereto."

The defence does not disclose how, or in what the error consisted, nor in what the mistake was made.

The general recitals contained in the answer will not aid this averment. If any error or mistake was made, it was by the Register and Receiver. It was their duty to examine and decide whether the plaintiff's claim was within the Act of 1866. If they found, as a matter of fact, that the land in controversy never had been claimed or held by or under any Mexican grant, and was not at any time within the exterior boundaries of such grant, the defendants would not claim that any error of law intervened.

All that could then be claimed is that they *found incorrectly upon a question of fact.* But that finding could not be reviewed in this case.

The error of law of which we suppose they intended to complain, could only arise in case the Register and Receiver found the fact to be that the land was claimed or held under a valid Mexican grant. But there is no averment of any such finding—nor that they were led to the opposite finding by the fraud or concealment of the plaintiff.

The law required the Register and Receiver to pass upon this question of fact. It was not *averred* that they did not, and we cannot *presume* that they did not. The answer is wholly silent upon that subject, and the *conclusive* presumption is that they did find upon that subject, and that their findings of fact justified and sustained their conclusion of law,

They do not allege whether the facts stated in their answer did or did not appear before the Reg-

ister and Receiver, but propose to submit those facts to another tribunal, and upon the finding of the second tribunal upon those questions of fact, predicate an error of law committed by the first.

No question was raised by such answer, and the findings of the Court below of facts suggested in it, were wholy immaterial.

IV.

Our fourth and last proposition is, that, even if the judgment of the Third District Court were erroneous, the Supreme Court of California should have remanded the case, upon reversal, for a new trial.

The judgment in the District Court was for the plaintiff. He could not therefore avail himself of any exceptions to the admission of testimony upon the matters introduced by the defendants in support of their special answer. The defendants were content with the findings upon the question as to whether the land in controversy was within the exterior boundaries of that grant Los Pocitas, and of course presented no exceptions to the testimony upon which that finding was based.

The appeal was based upon the findings and judgment alone. Upon what evidence the Court found that the land in question was within the exterior boundaries of that grant does not appear, with the single exception of a survey made in 1865, which included some *nine leagues* of land, while the decree under which it

was pretended the survey was made, confirmed but *two leagues*. We may fairly presume that this survey was relied upon by the Court as marking out the exterior boundaries of the grant, or it would not have been incorporated in its findings. See finding No. XI. Record, p. —. //

That that survey was fraudulent, is too plain to require argument, and that it was rejected and set aside by the Department appears in the finding of the Court.

It was not authorized by the decree of the Court confirming the grant Los Pocitas, and was therefore irregular. The Government was not bound by it, and repudiated it. We were not a party to the survey, and therefore could not be bound by it in any way except through the United States.

It does not appear that any evidence was heard or offered tending to show that this survey correctly marked the exterior boundaries of the grant while the fact that it was made with the evident purpose of securing to the grantee four and one-half times the quantity of land, he was entitled to, ought to be a sufficient showing of its incorrectness.

It is therefore respectfully submitted that the judgment and decision of the Supreme Court of the State of California ought to be reversed, and the judgment of the District Court of the Third Judicial District, in and for the County of Alameda, State of California, ought to be in all things affirmed.

JOHN B. HARMON,
Att'y for Pl'ff in Error.

No. .....

In the Supreme Court

OF THE

UNITED STATES.

SOCRATES HUFF,
Plaintiff in Error,

vs.

C. W. DOYLE and
CHARLES BALES,
Defendants in Error.

Brief and Argument of Plaintiff in Reply.

JOHN B. HARMON,
Attorney for Plaintiff in Error.

S. F. LEIB,
Attorney for Defendants in Error.

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1876.

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BRIEF AND ARGUMENT OF PLAINTIFF IN REPLY.

Counsel for defendants in part III on pp. 6 and 7 of his argument *assumes* two things, both of which are controverted in this case, in order to obtain a status from which he may attempt to prove the very facts assumed.

He assumes first that the land in controvery is *public land of the United States*, and next, that the plaintiff claims *only* by *prior possession*, based upon a *right derived from the State alone.*

But the findings show that this land was certified over to the State by the Commissioner of the

General Land Office of the United States, *after the presentation, examination and adjudication of the claim of plaintiff by the proper officers of the Land Departments of the United States*, under the Act of Congress of July 23, 1866, and that the State patent was issued in pursuance of all these proceedings.

The validity and effect of such proceedings, to wit: the presentation, investigation and approval of the claim of plaintiff, is the very point and marrow of the entire controversy.

It is shown to be a determination and decision by the proper officers in proceedings regularly taken, and the certification of the land is regular on its face, and *prima facie* at least shows that the land had ceased to be public land, and also that our possession and title were derived from the United States.

Upon its face, then, our title is equivalent to a patent from the United States.

Hence, at the time of the trial of this action, the defendants were not *prima facie* pre-emptors, and could not show that they were without first showing by parol proof that the acts and proceedings of the officers of the United States were invalid or void.

It is upon such foundation that counsel has constructed his entire argument.

Having assumed that the lands in controversy were public lands of the United States, and that we had nothing as a basis of our claim but prior

possession, and without claiming title except from the State alone, he asserts that the defendants cannot be disturbed or ejected, and cites authorities to support his "point."

He next argues that defendants' rights as such pre-emptors, though inchoate, cannot be set at naught by the State, nor by any officer of the Federal Government; that nothing but an Act of Congress can do it.

In this paragraph he adds to the former assumption not only a very positive assertion of the validity and indestructibility of their inchoate right, but the further assumption that plaintiff's claim in some way is founded upon some Act of the State, or of the Land Department, by which defendants' rights as pre-emptors were set aside.

No such fact exists, nor does any such question arise. If plaintiff's title is valid, its validity depends upon its presentation, investigation and approval by the proper officers of the United States, under the Act of Congress of July 23, 1866, and the subsequent certification of the land to the State.

And in that case the defendants acquired no right by their intrusion, and hence no right could have been taken away from them.

In our opening argument we said in substance that the record shows that the Land Department had refused to recognize the defendants as pre-emptors, because the Department officers had investigated and approved the plaintiff's claim, and

certified the land over to the State, and regarded that as a final disposition of the land.

The plaintiff, therefore, has at least the *prima facie* title, while defendants' claim stands rejected; the defendants had, therefore, not only to get rid of plaintiff's title, but as a preliminary to that, must secure the recognition of their claim by the Government before they could attack plaintiff's title.

Having argued that *possession alone* will not prevail against a *valid* pre-emption claim, counsel advances another step and says that the "*patent of the State alone* is no evidence of title whatever."

It is not material whether this proposition be true or not, as an abstract proposition.

The only case cited bearing on the question is Buhne *vs.* Chism, 48 Cal., 467. The defendant here was keeper of a United States Light house; the case arose under the Act of Congress of March 2d, 1853. (10 U. S. Stat., 248.) The selection in that case was subject to the approval of Secretary of the Interior, and his approval not having been had, and the United States afterward having reserved the land for Light house purposes, the selection was held not valid.

But under the Act of July 23d, 1866, Congress provides that in case the purchaser's claim is found in accordance with Section one of the Act, the land embraced therein shall be certified over to the State by the Commissioner of the General Land Office. (14 Stat. at Large, 218.)

In Foscalina *v.* Doyle & Bales, 47 Cal., 437, the plaintiffs' lessor held only the State certificate of purchase. Application had then been made to prove up the purchase and claim under the Act of 1866, and the application was still pending at the time of trial.

The Court then held that the land was not subject to pre-emption at the time defendants entered, or at any time since, and that plaintiffs' possession was lawful and protected by the Act of 1866, until he should have opportunity to present his claim, and have the same adjudicated by the proper officers of the United States.

The obvious distinction between the case cited by counsel and the one just quoted, is that in the one case the selection itself was subject to the approval of the Secretary of the Interior, while in the other, if the purchase and claim were found in accordance with the Act, the duty of certifying was mandatory. In the former case, the right of possession was not valid until the approval, while in the latter the right of possession might exist, and *prima facie* did exist, pending proceedings before the officers for the approval thereof.

So that aside from the fact in the case at bar, that our claim had been adjudicated and approved, and the land certified to the State, the lands were *prima facie* not subject to pre-emption, and this *prima facie* case must be overcome before it could appear that defendants were, even according to counsel's assumption, in ~~priority~~ merit with the United States.

Counsel having argued that the State patent is no evidence of title, next insists that the certification by the Commissioner to the State, was void. On page 9 of his argument, he says, "The rule invoked does not apply to the acts of the Commissioner in listing land, that is an *ex parte* proceeding as it was in this case. * * * * * The commissioner in such cases does not act judicially, and his act in such a case does not have the effect of a judgment, and the rule of *res adjudicata* does not apply."

Counsel here evades our main proposition. He applies to the mere ministerial act of certification the argument which we apply to the entire procedure of investigation and decision by these officers, upon the presentation and proofs of our claim. The certification of the land to the State in these cases, is simply the result of the finding and decision of the officers, viz., their adjudication of the questions of fact under the Act of 1866.

That the determination of these questions of fact is a judicial act, we have already argued, and it would seem would need no argument to prove.

But counsel asserts that this was an *ex parte* proceeding; there is nothing in the Record to justify this assertion, and it is not true. Congress by the Act of 1866, would seem to assume that in such a case as this, where the State purchaser was in the exclusive possession at the date of the passage of the Act, that there could be but the United States and the State claimant as proper parties.

There is certainly nothing to justify the assumption that five years after the passage of the Act, a stranger may forcibly intrude upon the possessions of the State claimant, and thereby gain a status which would enable him to intervene between the State claimant and the United States, and it might be successfully maintained that the defendants were not proper parties before the land departments.

This record is meagre as to details, but by defendants' answer at folio 18, it will be seen that they admit the presentation of the plaintiffs' claim at the United States Land Office, and that there was a contest before the Register and Receiver. Now the defendants did appear and did contest the plaintiff's application, and gave all their proofs, and the entire matter was submitted upon the proofs given, and upon all the proofs the case was investigated by the Commissioner and Secretary of the Interior, and the claim of the plaintiff was allowed and approved, and the claims of defendants rejected. The offer of proof and payment in December, 1871, was after the contest was ended in the Land Departments, and was done for the purpose of getting a better status in Court, as they supposed, in the case of Foscalina *vs.* Doyles & Bales, then pending.

There is no charge of fraud, imposition or unfairness proved or found in the case relative to this investigation, and it is not pretended by counsel that there was any unfairness or irregu-

larity. The proposition is squarely made that a Court and jury may review the entire case without reference to the finding and determination of the officers of the Land Departments.

Again, counsel asserts that this land was listed under the Act of Congress of August 3d, 1854; this is not true. This Act does not authorize the certification of land, it only declares the effect of listing in certain cases where the officer is acting merely in a ministerial capacity in listing lands to States in satisfaction of grants to States.

It could certainly have no application where the certification was the result of an investigation and adjudication of a claim.

This land was certified in obedience to the requirements of the Act of July 23d, 1866. This Act was in no sense a grant to the State, it was passed in the interest of State *purchasers*, assuming that they were equitable claimants to the lands embraced in invalid selections by the State, it gave to them a means or system of proving up their claims the same as pre-emptors on unsurveyed lands. Besides there could be no objection under the Act of 1854, to this certification on the ground of the *character* of the land, it was simply agricultural land and subject to the disposition of the United States, and such as was proper to be certified to the State as indemnity for 16 and 36 Sections.

And even under the Act of 1854, no certification will be assumed to be void, it could only be

regarded as void upon judicial inquiry by the proper tribunal in proceedings instituted by the United States or some one in privity with the United States. Otherwise there would be no presumption in favor of the validity of the record or the act of the officer.

But neither the United States or the Mexican grantee has any interest in attacking our title, and all questions concerning the same have long since been definitely, finally and forever settled, and we submit that it is the height of injustice, and contrary to all principles of law, to permit these persons to intrude themselves upon us and challenge our title upon this question.

We have in our opening brief discussed the subject of the *confirmatory* provisions of the Act, and have shown that such provisions do not apply to the class of lands mentioned in the 3d Section, that none of this class were *confirmed* to the State, and in the nature of the case could not be. The 1st Section of the Act is broad enough to embrace as it says, "all cases," viz., selections and sales under all the various grants to the State; in many of these cases the proceedings had long been completed, and the lands were held by purchasers under State patents at the date of the Act; all these were absolutely confirmed by the Act itself no matter what defects or irregularities existed, unless they fell within the exceptions.

But as to the classes mentioned in the 2d and 3d Sections, they were not confirmed by the Act,

but future action was required in order to obtain title under these Sections.

We have nothing to do with the supposed cases mentioned by counsel, only to say that none such exist, as the Act only dealt with selections made prior to July, 1866.

Counsel asserts that the Act of 1866, only provides a means of validating *locations made in accordance with State law*, and that because this land is now by the Court found to be embraced by the exterior boundaries of this Mexican grant, that this alone must be fatal to our title.

The answer to this is, that the Act was passed to quiet the titles of *purchasers*, and provide a means for *purchasers* to acquire titles in all cases where the State had *disposed* of the lands *to such purchasers in good faith* under her laws.

The Act of Congress assumes that the *selections made by the State* were contrary to existing laws, and the only condition relating to the laws of the State, is that the State *has disposed* of the same *to purchasers in good faith* under her laws.

The 3d Section of the Act assumes what was the fact, viz., that the State, in making these selections on unsurveyed land, based them upon surveys of State officials under her laws.

The record here discloses the fact that this *selection* was made by the *State* through her proper officers, and that *thereafter* the State sold the land to the plaintiff, who paid the full purchase price, and received a certificate of purchase. That he

thereupon entered into possession, made improvements thereon, and farmed the land from year to year, for over six years, and until he was ousted by these defendants. There is nothing in the case tending to show, and it is not pretended that he was not a purchaser in good faith.

The record further shows that in twelve days after the filing of the township plats of survey, he presented and proved up his claim and submitted the same for investigation and decision to the proper officers, designated by the laws of Congress for such purpose.

On this proof and investigation the claim was approved by the Commissioner of the General Land Office and the Secretary of the Interior of the United States, and thereupon the land was certified over to the State and patented to the plaintiff.

It is conceded by counsel that this is simply and purely an attack by defendants upon the title of plaintiff. It is not claimed that there are any equitable features about the case, and defendants do not claim any affirmative relief.

It is now contended that in an ordinary action at law in ejectment, the defendants in error, without title or privity with any source of title, may be permitted by parol to show, in effect:

1st. That the State of California, by its proper officers, made a mistake in the selection of the land in 1863, as to location.

2d. That the United States, by its officers thereunto authorized, made a mistake in their in-

vestigations as to the location of the land, and that the plaintiff must suffer the loss of his land and improvements by reason of these official mistakes.

3d. That it is competent and proper for these defendants, in an action at law and by parol proof before a jury or a Court sitting as a jury, to review all the questions of fact found by the proper officers of the United States, and thereby set aside the acts of these officers.

We submit that this case falls within the rule announced by this Court in French *vs.* Fyan *et als.*, No. 42, Oct. Term, 1876, and also within the principles announced in the cases of United States *vs.* Flint, Throckmorton *et als.*, in the Circuit Court of California. (See opinions of Field J., Sawyer J. and Hoffman J.

The Act of Congress provided that these claims should be presented and proved up the same as pre-emption claims upon unsurveyed land.

The tribunal for this purpose was already created, viz: the Register and Receiver, the Commissioner of the General Land Office, and Secretary of the Interior.

This claim was fairly presented, investigated, approved and allowed by this tribunal.

It cannot be doubted that these officers had full power, and the law made it their duty to investigate and determine the very question now presented by the defendants in this case.

This case is also within the rule of our Supreme Court in Hosmer *vs.* Wallace, 47 Cal., 461.

It seems farcical that the claimant should be compelled to present and prove up his claim before these United States officers, as he is required to do, and submit to their determination, and then afterward, without any charge of fraud or fraudulent imposition, to be compelled to submit to the finding of a jury upon every question of fact involved in the examination before the United States officers.

If the principles involved in the decision of our Supreme Court in this case are to prevail and become a rule of law in this State, then this case is but an instance and an illustration of what gross injustice may be wrought under the forms of law. No title like this, derived in pursuance of this Act of Congress, will have any security or stability; it will become as uncertain as the exterior boundaries of a Mexican grant, or the verdict of a jury. It will permit the intruder to allow the credulous victim of such title to remain in possession until he has expended his labor and money in improving and subduing the land, and then to intrude and oust him, taking possession of his property, and when suit is brought for possession, to bring his cloud of witnesses to swing around his lands and possessions the indefinite ancient exterior boundaries of some old Mexican grant, and thus rob him of his property.

We are satisfied that this Court will not sanction principles which lead to such injustice, but will, under well-settled principles of law, reach a

conclusion which will sustain the title of plaintiff, which this record shows he has honestly and fairly acquired.

Respectfully submitted,

JOHN B. HARMON,

Plff's. Atty.

No.....

In the Supreme Court

OF THE

UNITED STATES.

Socrates Huff,

Plaintiff in Error,

VS.

C. W. Doyle and Chas. Bales,

Defendants in Error.

Argument on Behalf of Defendants in Error.

S. F. LEIB,
Att'y for Defts. in Error.

JOHN B. HARMON,
Att'y for Pl'ff in Error.

Filed .....

.....*Clerk.*

SAN JOSE:

Alex. P. Murgotten, Printer, Commercial Bank Building.

1875.

IN THE SUPREME COURT

OF THE

UNITED STATES.

Socrates Huff,

Plaintiff in Error,

Vs.

C. W. Doyle AND
Charles Bales,

Defendants in Error.

Brief for Defendants in Error.

I.

STATEMENT OF CASE.

This was an ordinary action of ejectment brought in a District Court of California by the plaintiff in error against the defendants in error. The defendants denied the plaintiff's title to the lands

and also set up as affirmative matter, by way of defense, and also as a basis of affirmative relief, that they were qualified pre-emptors, and had gone upon the lands as such; filed their claims, made their proofs and tendered the pay therefor; but that their entries had not been, at that time, allowed. They further alleged the date of the United States survey of the land in question, and that it was within the exterior boundaries of a valid Mexican grant, which grant had been finally confirmed; and that the final survey thereof was not finally approved until June, 1871. That the lands had been listed to the State by the Commissioner of the General Land Land Office, while a contest between them and the State was pending in the local land office before the Register and Receiver.

Record folios 7 to 19 inclusive.

The cause was tried by the Court without a jury and the Court from the agreed facts and the evidence found the facts; which findings neither party questioned, and the case went to the Supreme Court of California on these facts; where the judgment of the *nisi prius* Court was reversed and a judgment ordered for the defendants on the findings; and the case comes to this Court by writ of error upon the findings.

The material facts as thus found, are: that in

1863 the State of California located these lands as lieu lands under the Act of Congress of March 3d, 1853. That the plaintiff became the purchaser of such State location and went into possession of the lands under it, and remained in possession until 1870 when he was ousted by defendants

That the lands were not surveyed by the United States until 1871, when the plaintiff presented his State location for approval by the Land Office Department. That in pursuance of such application the State claim was approved on the 15th of November, 1871, and the land was listed to the State, and the State issued to him her patent on the 29th of November, 1871. That defendants were in possession of the land at the commencement of the action and at the time of trial, and that the rents and profits were three dollars per acre per year since November, 1871. That the defendants were personally qualified to pre-empt Government land; and had taken the proper steps to secure their rights as such; had made proof and tendered payment, which payment had been refused by the local officers.

That the lands were within the exterior boundaries of a valid Mexican grant and that they had been excluded from the final survey, which survey was not made until 1869, and not finally approved until 1871.

Record, fols. 21 to 28 inclusive.

II.

ARGUMENT.

We do not propose to follow the argument of the plaintiff in error in all its details, as we conceive much of it to be immaterial to the case, but we shall present our views and propositions in answer to plaintiff's positions in as few words as possible, and in our own order.

The first point we make is, that the State selection made in 1863 was void as the land was then unsurveyed and not subject to State selection; and was also within the exterior boundaries of a valid Mexican grant and was therefore reserved lands and not open to State selection.

Terry vs. Myerle, 24 Cal. 609.
Grogan vs. Knight, 27 Cal. 517.
Shipley vs. Cowan, U. S. Sup. Court Oct. Term 1876.
Sanger vs. Newhall, U. S. Supreme Court October Term, 1875.

This proposition we understand is not questioned by plaintiff in error.

See Brief, p. II.

III.

The next point we make is that a qualified pre-

emptor in possession of public land of the United States (other than the 16th and 36th Sections in place) who has complied with the pre-emption laws by settling, improving, filing his claim, offering his proof and payment, (or in other words taken the proper steps to initiate his claim) is in privity with the United States, and cannot be disturbed or ejected by one claiming by prior possession or by right derived from the State alone.

Page vs. Hobbs, 27 Cal. 483.
Kile vs. Tubbs, 23 Cal. 442.
Kile vs. Tubbs, 23 Cal. 402.
Tyler vs. Green, 28 Cal 406.
Robinson vs. Forest, 26 Cal. 317.

We are not ignorant of the proposition that a pre-emptor's right to land prior to payment made is inchoate in its nature, and may be set at naught by an Act of Congress; but we insist that *nothing but an Act of Congress can do this*, the State cannot do it, neither can an officer of the Federal government do it, without the sanction of an Act of Congress.

Frisbie vs. Whitney, 9 Wal. 193-5.
The Yosemite case, 15 Wal. 87.

But plaintiff's counsel claims that the State patent put in his client the legal title, that it is not a void instrument, and the defendants did not occupy such a position as to enable them to attack it.

A State patent for land other than the 16th and 36th sections is no higher evidence of title than the deed of a citizen. It *alone is no evidence of title whatever* for the reason that the State is not the *paramount source of title*; she can only hold such lands as these by a derivative title from the United States, and must show a legal and effectual deraignment of title from the United States to support her patent. This must be so upon principle and lawyers in speaking of patents often confuse things. They take the rule that applies to a sovereign and apply it to a State that is not a sovereign as to land. The grant or patent of a king or of the United States stands on very different ground from a State patent; because in the one the land is vested by paramount right and has the sovereign power to convey; while a State has no title to such land unless by derivative title from the sovereign. On this point see

Burne vs. Chism, 43 Cal. 467.
Patterson vs. Winn, 12 Wheaton 384.
Rice vs. The Railroad, 1 Black. 375.

IV.

But it is insisted in this case that the State patent was properly supported; that it was shown that the land had been listed to the State by the Commissioner of the General Land Office, before

the State issued her patent, and that this listing was upon proof made; and that the presumption is the Commissioner found from such proof that the lands were *not* within the exterior boundary of the grant, and that his finding on such question is not open to dispute in the Courts.

That it is the finding of special tribunal on a question of fact and is final. The rule invoked does not apply to the act of the Commissioner in listing land, that is an exparte proceeding as it was in this case.

The United States does not issue patents to States for lien lands, but she lists them merely under the Act of August 3d, 1854, and such listing does not *ipso facto* convey any title to the State. The Commissioner in such cases does not act judicially and his act in such a case does not have the effect of a judgment and the rule of *res adjudicata* does not apply.

He does not have jurisdiction in such a case to hear or determine legal disputes or conflicting rights.

Hastings vs. Jackson, 46 Cal. 246.

The Act of Congress is explicit on this point, it says "Where lands embraced in such lists are not of the character embraced in such Acts of Congress, and are not intended to be granted thereby. *Said lists* so far as these lands are concerned *shall be per-*

fectly null and void, and no right, title, claim or interest shall be conveyed thereby."

Lester, Vol. 1, p 236 No. 249.

The State selection being void, the listing conveyed no title to the State; and her patent is void; for where the State has no title to the thing granted her patent is void.

Morton vs. Nebraska, 21 Wal. 660,
Rice vs. The Railroad, 1 Black. 375.

V.

But it is claimed that the Act of Congress of July 23d, 1866, confirmed this void selection, or rather provided a means for its proof and final establishment which has been followed.

That Act has been often considered by our Supreme Court and the following propositions have been settled by its decisions, viz.:

1st—The holder of a State selection must show a compliance with the Act.

2d—That a party resisting a State location who claims that the location is excepted from the confirmatory provisions of the Act must show it to be within the exception.

3rd—That no title passed to the State by force of the Act, but that such Act only provided a means

for the confirmation of selections in particular situations pointed out in the Act.

Toland vs. Mandell, 38 Cal. 30.

Silent vs. Bell, No, 2,536, October Term 1870, not reported in printed vols, of Reports.

Hodapp vs. Sharp, 40 Cal. 69.

Burne vs. Chism, 48 Cal. 467.

The Act of 1866, relied on by plainriff in error, specially excludes lands in the condition these are shown to have been from its confirmatory provisions. No means were provided by that Act for the validation of such locations and no privilege whatever was conferred upon the holders of such locations. The language of the Act is: "No selection made by said State contrary to existing laws, shall be confirmed by this Act for lands to which any adverse pre-emption, homestead or other right has, *at the date of the passage* of this Act, been acquired by any settler under the laws of the United States, or to any lands which have been reserved for naval, military or Indian purposes by the United States, or to any mineral lands, *or to any lands held or claimed under any valid Mexican or Spanish grant.*"

This language is too clear for doubt as to its meaning, the Act means what it says, that any land held or claimed at its passage under any valid

Mexican or Spanish grant is not within its confirmatory provisions. Counsel contend that it means that such land is not so held or claimed at the time the claim is presented to be proved up; that would be nonsense because the claim cannot be presented or proved until the land is surveyed by authority of the United States and this would not be done until the Spanish grants were finally located, hence the use of these terms would be useless under counsel's construction of the Act. Counsel thinks that reason and sound policy favors his construction, we think not. The Act was not intended to allow an original grant claimant who had a grant for one league in boundaries of eleven to hold the whole eleven leagues; one by the grant and the remainder by State locations. This was in several cases attempted in California; under our decisions a grant claimant, until final survey was entitled to possession to the extent of his boundaries, hence he could make State selections of the whole grant and when final survey fixed his grant claim definitely he would hold the balance by State selections already made. Again if counsel be right then the Act of 1866, is in conflict with itself because the 7th Section permitted the purchasers from Mexican grantees or assigns to pre-empt their purchases, now if State selections were also approved inside grant boundaries we would have the

State locator claiming the land under the Act of 1866 and the purchaser from the grant claimant claiming it under the same Act. This was never intended, the State locator was not allowed to *make* any claim to such lands.

This land was claimed and held under a valid grant at the time of the passage of the Act and for a long time thereafter, viz: until 1871. This being so the lands were not subject to being listed, such listing conveyed no title to the State; and her patent was and is void.

See authorities already cited.

There is another matter equally fatal to this location, it is this, the Act of 1866 only provided a means of validating locations made in accordance *with State law;* now no law of California ever permitted or sanctioned State locations upon lands claimed under Spanish or Mexican grants; the State did authorize the location of unsurveyed public lands, but never of reserved lands, or lands claimed under grants.

See Act of 1866 before referred to.

VI.

It is insisted with some degree of earnestness that the plaintiff was in possession of the land under his State location and the Act of 1866 legalized that possession until he could be allowed

to present and prove up his claim, and any intrusion of defendants before that time was illegal, and he should have prevailed on this question alone.

This is unsound, the Statute of 1866 only legalized possessions in cases where it offered a means for the confirmation of the locations; but as we have shown these locations were not included in the confirmatory provisions of the Act but were excluded because within the exterior boundaries of a valid Mexican grant.

Again, it is urged that as plaintiff had prior possession of the lands the defendants must commit a tresspass to get possession, and such a trespass could not be the proper or effective foundation of a pre-emption right. This sounds well but a moment's reflection will show it an unsound and untenable position. If that were so it would be an easy matter for rich men to practically annul the pre-emption laws; they could fence in and improve large districts of country and exclude the pre-emptor and homestead settler most effectually—could thus farm and derive all the benefits from the land without buying it or paying any taxes on it. This will not do, the pre-emptor has the right to settle on any public land not claimed under some valid law whether the land be improved or not.

It is further urged that prior possession under the decisions in California, is sufficient on which to maintain ejectment, The doctrine of prior possession is only available in ejectment in cases where neither party has title or is in privity with the paramount source of title. When the defendants first went into possession of these lands they were not open to pre-emption because within the exterior boundaries of a valid Mexican grant not finally located. The School Warrant locations were void and the holder of them was but a trespasser; but as he was a prior possessor, had he then sued he would have prevailed on prior possession, unless the defendants had shown a license under the grant claimant in which case they would have prevailed because the grant claimant had a right to the possession of all the lands within the exterior boundaries of his grant until final location by the United States.

But the moment the grant was finally located so as to exclude these lands from it the position of affairs changed, the land from that instant was open to pre-emption and the defendants being qualified pre-emptors in possession and having improvements on the land were in privity with the

United States and could not be disturbed by one having no title.

Mahoney vs. Van Winkle, 33 Cal. 456-9, and cases before cited.

The final location of the grant was on the 6th of June, 1871. The land was then unsurveyed and the defendants claims attached under the Act of 1862.

Lester, vol. 2, p. 48, Sec. 7.

On the 28th of June, 1871, the official plat was filed in the local office, and the defendants claims were covered by the general pre-emption laws of of 1841.

Lester, vol. 1, p. 59.

Actual settlers under the pre-emption laws of the United States are the most favored of all claimants for lands under the laws of the United States.

Clements vs. Warner, 24 How. 395.

The point is made by counsel that the pleadings of the defendants are not sufficient to permit them to attack the plaintiff's patent. The defendants denied the plaintiff's title, and that is sufficient, leaving out of the case for the sake of the argument, the other matter contained in the answers.

The defendants in this case do not seek to set aside the plaintiff's patent for fraud or mistake, nor are they endeavoring to control the legal title evidenced by the plaintiff's patent. But they insist that the plaintiff's patent is void and conveys no title because of a lack of title in the State, this can be done in an action at law—in an action of ejectment under a denial of plaintiff's title. This Court has so held as well as the Supreme court of California.

Patterson vs. Winn, 11 Wheaton, 380.
Stoddard vs. Chambers, 2 Howard, 284.
Morton vs. Nebraska, 21 Wal. 660,
Minter vs. Crommelin, 18 How. 87.
Parker vs. Duff, 47 Cal. 554.

VII.

The last point made by plaintiff's counsel is rather a novel one; he claims that the Supreme Court of California erred in not, (upon the reversal of the District Court,) ordering a new trial, so he could avail himself of some imaginary exception that might exist; and yet counsel asks this Court to reverse the Supreme Court of California and affirm the judgment of the Court below, without awarding a new trial. But the Supreme Court of

California could not have awarded a new trial as none was asked by either party, but an appeal was taken from the judgment upon the findings, and all that Court could do was to affirm or reverse and order judgment for the defendants.

Wherefore we respectfully submit that there is no error in the decision and judgment of the Supreme Court of California and that the same should be in all things affirmed.

S. F. LIEB,
Att'y for Defendants in Error.